154265 497

RECORD, CASE No. 14,107.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

TERM No., 396. 153

THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY, PLAINTIFF IN ERROR.

vs.

NELLIE E. PIERCE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED AUGUST 20, 1900.

RECORD, CASE No. 14,107.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 396.

THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

NELLIE E. PIERCE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Præcipe for summons	2	1
Bond for costs	3	2
Declaration	4	2
Summons	12	6
Marshal's return	13	6
Plea	14	7
Replication	17	8
Demurrer and rejoinder	24	11
Order granting motion to amend rejoinder	27	12
Further rejoinder	28	13
Sur-rejoinder	29	13
Order beginning trial	30	14
Order continuing trial	31	14
Verdict	32	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1892.

	Original	Print.
Motion for new trial	33	15
Order postponing hearing of motion for new trial	34	15
Order taking motion for new trial under advisement	35	16
Remittitur	36	16
Judgment	37	16
Bond on writ of error	39	17
Consent for further time to file bill of exceptions	41	18
Order granting further time to file bill of exceptions	42	18
Stipulation for further time to file bill of exceptions	43	19
Order granting further time to file bill of exceptions	44	19
Bill of exceptions	45	19
Testimony of Nellie E. Pierce	45	20
Dr. S. R. Ward	48	21
Dr. James A. Stubbs	50	22
Dr. Henry Lyman	52	23
Nellie E. Pierce (recalled)	53	24
Cornelius Mackenzie	57	26
Miss M. L. Allen	58	27
John Hanna	59	27
John Thompson	61	29
Henry A. Gardner	63	30
John Hanna (recalled)	64	31
Mrs. J. B. Young	65	31
Miss M. L. Allen (recalled)	68	33
Emma Hanna	69	34
Mrs. J. Fox	70	34
Mr. Mackenzie	70	34
William Hanna	71	35
Nellie E. Pierce	71	35
Defendant's motion for verdict	71	35
Charge and exceptions	71½	35
Motion for new trial	73	37
Judge's certificate	73	37
Order to file additional rejoinder *nunc pro tunc*, &c.	74	37
Clerk's certificate	76	38
Writ of error	77	38
Citation	78	39
Proof of service of citation	79	39
Assignment of errors	80	39

1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the circuit court of the United States for the seventh judicial circuit, on Tuesday, the fifteenth day of April, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and ninety, and of our Independence the one hundred and fourteenth year.

WM. H. BRADLEY, *Clerk.*

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY. } Trespass on the Case.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the third day of September, 1889, came the plaintiff, by her attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, her præcipe for a writ of summons, and also at the same time filed her bond for costs in said entitled cause; which said præcipe and bond are respectively in the words and figures following, to wit:

2 *Præcipe.*

In the United States Circuit Court, Northern District of Illinois, to the October Term, A. D. 1889.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY. } Case. Damages, $75,000.00.

The clerk of the United States circuit court, northern district of Illinois, will please issue a summons in the above-entitled cause to said defendant in the plea of case to the damage of said plaintiff in the sum of seventy-five thousand dollars, directed to the marshal of said court to execute, and make it returnable to the October term of said court, A. D. 1889, and oblige.

Sept. 3d, 1889.

CREWS & OWEN,
Pl'ff's Att'ys.

(Endorsed:) Filed Sept. 3, 1889. Wm. H. Bradley, clerk.

3 *Bond for Costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

Circuit Court, October Term, A. D. 1889.

NELLIE E. PIERCE
vs.
CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY. } In Case.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by her we hereby agree and stipulate that execution may issue against our property for any costs taxed against her.

Dated this 3d day of September, A. D. 1889.

CREWS & OWEN.

(Endorsed:) Filed Sept. 3, A. D. 1889. Wm. H. Bradley, clerk.

4 On the same day, to wit, on the third day of September, 1889, came the plaintiff, by her attorneys, and filed in said clerk's office her declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

Declaration.

In the United States Circuit Court, Northern District of Illinois, to the October Term, A. D. 1889.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY. } Case.

And now comes Nellie E. Pierce, plaintiff herein, by Crews & Owen, her attorneys, and complains of the said defendant, The Chicago, St. Paul & Kansas City Railway Company (a corporation organized and doing business under the laws of the State of Iowa), of a plea of trespass on the case, for that whereas, to wit, on the 15th day of September, A. D. 1887, the defendant, being a body corporate and at that time operating and doing business under the name and style of the Minnesota & Northwestern Railway Company (the same being a foreign corporation), was the owner, proprietor, and operator of a steam railroad extending from a certain place, to wit, the city of Marshalltown, in the State of Iowa, to the city of Chicago,
5 in the county of Cook and State of Illinois, and was also the owner and proprietor of locomotive engines and trains of cars running on said railroad for the conveyance of goods and passengers, and was also engaged in carrying and conveying, for hire and reward, passengers and travellers over and upon said rail-

road from said city of Marshalltown to said city of Chicago; that on the day aforesaid, viz., on the said September 15th, A. D. 1887, at a certain place, viz., the said city of Marshalltown, this plaintiff became a passenger on one of said defendant's trains of cars to be safely carried thereon from said city of Marshalltown to said city of Chicago for the sum of six dollars, then and there paid to said defendant; that upon said train of cars was a car known and designated as a sleeping car, and that said plaintiff, by reason of the sum hereinbefore averred to have been paid to said defendant, had the right and privilege to enter and occupy the said sleeping car and a berth therein for the purpose of rest and sleeping; that said defendant, on the day aforesaid and at the place aforesaid, received said plaintiff as such passenger, and it thereupon became the duty of the defendant safely to carry said plaintiff from the said city of Marshalltown to said city of Chicago and at said city of Chicago safely to discharge and release the said plaintiff from said train of cars.

But this plaintiff avers that said defendant carelessly, negligently, and unskillfully ran, managed, and conducted its said train
6 of cars on which said plaintiff was a passenger, and so carelessly, negligently, and un-killfully ran, managed, supervised, and conducted its said line of railroad from said city of Marshalltown to said city of Chicago, and so carelessly, recklessly, negligently, and unskillfully run, managed, and conducted and supervised divers locomotives and trains of cars on the day aforesaid, running over and upon said defendant's said line of railroad and owned and operated by said defendant, that on said day aforesaid, viz., the 15th day of September, A. D. 1887, at about the hour of 11 o'clock at night, and while said plaintiff was a passenger as aforesaid on said train as aforesaid and occupying a berth in the sleeping car aforesaid at a certain place, viz., Hudson city, in the State of Iowa, a point on the line of said railroad and near to the town of Cedar Rapids, a station on the line of said railroad, and being a point on the said railroad intermediate between the said city of Marshalltown and said city of Chicago, and through the carelessless, negligence, recklessness, mismanagement, and unskillfullness of said defendant, a collision occurred on said railroad by the running of a locomotive engine owned, run, and operated on said day by said defendant on said railroad into, upon, and through the said train of cars upon which said plaintiff was a passenger, and more especially into and upon the said sleeping car of said train on which plaintiff was a
7 passenger, and wherein said plaintiff, at the time and place aforesaid, was in her said berth resting and asleep, and with such force and violence that said plaintiff, who at said time and place was in the exercise of all due care and diligence on her part to be exercised, was precipitated and forcibly hurled forward and thrown down and out of her said berth in said sleeping car, and crushed, shocked, bruised, lamed, and jammed, and in divers other ways abused and injured in and about her person, by means whereof the spine and right limb of said plaintiff — permanently and

irremedially injured and her nervous system so completely shocked that said plaintiff is now paralyzed in her lower limbs, is unable to stand alone, is in constant pain, and is permanently and irretrievably crippled and wholly incapable for business, social, or domestic life, and thereby said plaintiff was and is obliged to and did then and there lay out and ever since has been and is now laying out large sums of money, now amounting to three thousand dollars, in and about endeavoring to be cured *for* the injuries so received and to alleviate the pain and suffering arising from said injuries; and also by means of the premises the said plaintiff then and there became and ever since has been and is now and forever during her natural life will be sick, lamed, paralyzed, crippled, and disordered, and has ever since suffered, does now suffer, and will forever hereafter
8 during her natural life suffer constant pain and physical torture, and has ever since been hindered and prevented and is now hindered and prevented and will forever hereafter during her natural life be hindered and prevented from attending to her business and affairs, and has ever since lost and been deprived of and is now losing and being deprived of divers great gains and profits, which she might and otherwise would have made and acquired.

Second count. And also for that whereas the said defendant, viz., on the 15th day of September, A. D. 1887, being then and there a body corporate and on that day operating and doing business under the name and style of the Minnesota & Northwestern Railroad Company, was the sole proprietor and operator of a steam railroad extending from a certain place, viz., the city of Des Moines, in the State of Iowa, to the city of Chicago, in the State of Illinois, and was also the owner and proprietor of locomotive engines and trains of cars running on said railroad for the conveyance of goods and passengers, and was also engaged in carrying and conveying, for hire and reward, passengers and travelers over and upon said railroad from the said city of Des Moines to the said city of Chicago; that on the day aforesaid, viz., on the said September 15th, A. D. 1887, at a certain place, viz., the city of Des Moines aforesaid, this plaintiff became a passenger on one of defendant's trains of cars to be safely carried therein
9 from said city of Des Moines to said city of Chicago for the sum of six dollars then and there paid to said defendant; that upon said train was a car known and designated as the sleeping car, and that said plaintiff, by reason of the sum hereinbefore averred to have — paid to said defendant, had the right and privilege to enter and occupy said sleeping car and a berth therein for the purposes of rest and sleeping; that said defendant on the day aforesaid and at the place aforesaid received said plaintiff as such passenger, and that it thereupon became the duty of the defendant safely to carry said plaintiff from said city of Des Moines to said city of Chicago and at said city of Chicago safely to discharge and release said plaintiff from said train of cars; but said plaintiff avers that said defendant, neglecting and disregarding their said duty so as aforesaid, so carelessly, negligently, and unskillfully ran, managed, and conducted

its said train of cars on which said plaintiff was a passenger and so carelessly, negligently, and unskillfully ran, managed, and supervised and conducted its said line of railroad from said city of Des Moines to said city of Chicago that on said day aforesaid, viz., the 15th day of September, A. D. 1887, at or about the hour of 11 o'clock at night, and while said plaintiff was a passenger as aforesaid in said train and while said plaintiff was occupying a
10 berth in the sleeping car aforesaid at a certain place, viz., Hudson city, in the State of Iowa, a point on the line of said railroad and near to the town of Cedar Rapids, in said State, a station on the line of said railroad, and being a point on said railroad intermediate between said city of Des Moines and said city of Chicago, and through the carelessness, recklessness, unskillfulness, and negligence of said defendant as aforesaid said plaintiff, who was using all due care and diligence at that time in her berth in said sleeping car resting and asleep, was hurled, jolted, and precipitated forward and out of her said berth in said sleeping car and thrown with great force and violence down and out of her said berth in said sleeping car and crushed, shocked, bruised, lamed, and jammed, and in divers other ways abused and injured in and about her person, by means whereof the spine and right limb of said plaintiff were permanently and irremediably injured and her nervous system so completely shocked that said plaintiff is now wholly paralyzed in her lower limbs, is unable to stand alone, being in constant pain, and is permanently and irretrievably crippled and wholly incapacitated for business, social or domestic life, and thereby said plaintiff was and is obliged to and did then and there lay out and ever since has been and is now laying out large sums of money, now amounting to three thousand dollars, in and about endeavoring to be cured of the injuries so received and to alleviate the pain and suffering arising from said injuries.

And said plaintiff avers that by reason of the premises she
11 then and there became and was sick, sore, lame, paralyzed, crippled, and disordered, and that she has ever since then and forever during her life will be sick, sore, lamed, paralyzed, crippled, and disordered, and has ever since then suffered, does now suffer, and will forever after during her natural life suffer constant pain and physical torture, and has ever since then been hindered and prevented, is now being hindered and prevented, and will forever hereafter during her natural life be hindered and prevented from attending to her business and affairs, and has ever since then lost and been deprived of, is now losing and being deprived of, and forever hereafter during her natural life will lose and be deprived of divers great gains and profits which she might and otherwise could and would have made and acquired.

And plaintiff avers that by reason of the premises she has been damaged in the sum of seventy-five thousand dollars, and hence she brings this suit.

NELLIE E. PIERCE, *Plaintiff*,
By CREWS & OWEN, *Her Att'ys.*

(Endorsed :) Filed Sept. 3, 1889. Wm. H. Bradley, clerk.

12 On the same day, to wit, on the third day of September, 1889, there issued — of said clerk's office a writ of summons in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

Circuit Court of the United States of America, Northern District of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon the Chicago, St. Paul and Kansas City Railway Company, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Nellie E. Pierce of a plea of trespass on the case to her damage, as is alleged, of seventy-five thousand dollars, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Chicago [SEAL.] aforesaid, this 3d day of September, in the year of our Lord one thousand eight hundred and 89, and of our Independence the 114th year.

WM. H. BRADLEY, *Clerk.*

13 *Marshal's Return.*

I have served the within writ personally upon the within-named The Chicago, St. Paul and Kansas City Railway Company by delivering to J. M. Egan, gen'l manager of said company, a true copy thereof this 4th day of September, A. D. 1889. The president of the aforesaid Co. is not found in my district.

F. H. MARSH, *U. S. Marshal,*
By GEO. N. JONES, *Deputy.*

(Endorsed:) Filed Sept. 4, A. D. 1889. Wm. H. Bradley, clerk.

14 Afterward, to wit, on the twelfth day of September, 1889, came the defendant, by its attorneys, and filed in said clerk's office its plea in said entitled cause; which said plea is in the words and figures following, to wit:

Plea.

In the United States Circuit Court, Northern District of Illinois, to October Term, 1889.

NELLIE E. PIERCE
vs.
CHICAGO, ST. PAUL & KANSAS CITY RAILWAY CO. } Case.

And the defendant, Chicago, St. Paul & Kansas City Railway Co., by its attorneys, Gardner, McFadon & Gardner, comes and defends the wrong and injury when, etc., and says that the plaintiff ought not to have her aforesaid action against it, the defendant, because it says that after the several supposed causes of action alleged in the declaration had arisen and before the commencing of this suit, to wit, on September 23rd, 1887, at Chicago, Illinois, the plaintiff, by her deed bearing date of that day, released, quitclaimed, and forever discharged the defendant, in consideration of the payment of sixteen hundred dollars by the Minnesota and Northwestern Railroad Company to plaintiff, from all said causes of action and each of them, as by said deed of release appears, which deed is as fol-
15 lows in words and figures:

"*Release of Damages.*"

Know all men by these presents that in consideration of the sum of sixteen hundred dollars to me in hand paid by the Minnesota & Northwestern Railroad Company, the receipt whereof is hereby acknowledged, I have released, acquitted, and discharged, and by these presents do release, acquit, and forever discharge, the said railroad company, its successors and assigns, of and from any and all cause or causes of action, costs, charges, claim, or demand of whatever name or nature in any manner arising or to grow out of injuries received by me at or near Wilson Station, on the Chicago, St. Paul & Kansas City railway, in Iowa, on the 15th day of September, 1887, and hereby release the said Chicago, St. Paul & Kansas City railway from all claims or demands on account of said injuries, the receipt of said sum of sixteen hundred dollars being hereby acknowledged to be in full payment, satisfaction, and discharge of any and all such cause or causes of action, costs, charges, claim, and demand arising or growing out of said injuries and in full satisfaction and settlement of the same as against both of said railroad companies.

In witness whereof I have hereunto set my hand and seal this twenty-third day of September, A. D. 1887.

NELLIE E. PIERCE. [SEAL.]

16 And the cause of action so released is the same as those mentioned in the declaration.

And this the defendant is ready to verify.

Wherefore it prays judgment if the plaintiff ought to have her aforesaid action against it.

GARDNER, McFADON & GARDNER,
Attorneys for Defendant.

(Endorsed:) Filed Sept. 12, 1889. Wm. H. Bradley, clerk.

17 Afterward, to wit, on the twenty-third day of September, 1889, came the plaintiff, by her attorneys, and filed in said clerk's office her replication to the plea in said entitled cause; which said replication is in the words and figures following, to wit:

Replication.

In the United States Circuit Court, Northern District of Illinois, —— Term, A. D. 1889.

NELLIE E. PIERCE
v.
THE CHICAGO, ST. PAUL & KANSAS CITY RAILROAD COMPANY. } Case.

The plaintiff, as to the plea of the defendant by it above pleaded, says that she, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having her aforesaid action, because she says that at the time of the execution of the deed of release in said plea mentioned the plaintiff was suffering great agony of body and mind from the injuries received and set out in plaintiff's declaration to such an extent that she was wholly deprived of her proper reasoning powers; that at that time a paralysis of her lower limbs from the injuries aforesaid had commenced to affect her and she at the time aforesaid thought and believed herself to be dying, and was by reason of her extreme distress
18 and terror, and being then under fear of death & on account of the effect it had upon her mind at the time of the pretended execution of said deed of release, of insufficient and unsound mind and memory and incompetent to make a contract.

And, further, that plaintiff being at that time sick and distressed as aforesaid, believing as aforesaid that she was then dying, and being by such sickness, distress, and fear of death greatly weakened in mind and will, which was well known to defendant, she was not equal to protecting herself and had not the strength of will to do so; and greatly desiring at any cost to get persons, except her nurse and family, out of her room the agent of the defendant, well knowing the premises as aforesaid, taking advantage of her said weakened and distressed condition, by reason of his superior strength and will, overreached plaintiff and so persuaded her and so pressed her with great insistence to sign said deed of release that he wrongfully and fraudulently procured plaintiff, by reason of her said distress, weakness, and sickness, to so sign the same; wherefore the same was not her voluntary act of her own free will, but done under duress and of no binding effect.

And plaintiff further says that the said sum of sixteen hundred dollars ($1,600.00) paid to her upon such contract is wholly and by a very large sum insufficient to pay for the injuries and
19 damage of the plaintiff, but is a very small and insignificant sum compared thereto.

And plaintiff says and concedes and asks that the said amount may be credited upon and deducted from any sum she may be entitled to in this case as a payment thereof, and hereby says and offers to pay back any difference between the amount of her recovery herein and the said sum of sixteen hundred dollars ($1,600.00) if her recovery should be less than that amount.

And plaintiff further says that she has made a tender of said sum of sixteen hundred dollars ($1,600.00), together with six (6) per cent. interest from the date of the receipt by her, in lawful money of the United States, to Robert D. McFadon, the resident attorney and counselor of the defendant, at the city of Chicago, and also tendered the said sum, with interest as aforesaid, to the general passenger agent and to the general freight agent of said defendant at the general office of said defendant, in said city of Chicago, the president, vice-president, and general manager of said company not then residing or being in the said city of Chicago or in the county of Cook, and this the plaintiff is ready to verify; wherefore she prays judgment, etc.

And the plaintiff, as to the plea of the defendant above pleaded, for further replication thereto says *precludi non*, because she says that at the time of the pretended execution of the deed of release in
20 said plea mentioned plaintiff was suffering great agony of body and mind from the injuries received and set out in plaintiff's declaration to such an extent that she was wholly deprived of her proper reasoning powers; that at that time a paralysis of her lower limbs from the injuries aforesaid had commenced to effect her, and she, at the time aforesaid, thought herself to be dying, and was, by reason of her extreme distress and sickness, and then being under fear of death, and on account of the effect it had on her mind at the time of the pretended execution of said deed of release, not a full, sufficient, and sound mind and memory to make a contract, of which the defendant had notice at the time; wherefore said pretended deed of release is void and of no force or effect.

And plaintiff comes and concedes and offers that the said sum of sixteen hundred dollars ($1,600.00) paid to her upon such contract may be credited upon and deducted from any sum she may be entitled to in this cause as a payment thereon, and that the residue of the sixteen hundred dollars ($1,600.00), if not over the amount adjudged herein, may be paid back to defendant; and plaintiff says that the amount to which plaintiff is entitled in this action by reason of her injuries aforesaid is largely in excess of said sum of sixteen hundred dollars ($1,600.00); that said sum is a very small and insignificant amount compared to the sum she is entitled to recover herein.

Plaintiff further says that upon the commencement of
21 this action she tendered to said defendant, in lawful money

of the United States, the full sum of sixteen hundred dollars ($1,600.00), together with interest thereon at the rate of six per cent. per annum from the time of the receipt of the same by her, and this the plaintiff is ready to verify; wherefore she prays judgment, etc.

And the plaintiff, as to the plea of the defendant by it above pleaded, for further replication thereto says *precludi non*, because she says that at the time of the pretended execution of the deed of release in said plea mentioned plaintiff was suffering great agony of body and mind from the injuries received and set out in plaintiff's declaration to such an extent that she was wholly deprived of her proper reasoning powers; that at that time a paralysis of her lower limbs, from the injuries aforesaid, had commenced to affect her, and she at that time thought herself to be dying, and was by reason of her extreme distress and sickness and fear of death greatly weakened in mind and will, and was not equal to protecting herself, and greatly desiring at any cost to keep all persons except her nurse and family out of her room the agent of defendant, craftily and intentionally taking advantage of her said weakness and distressed condition, by reason of his superior strength and will overreached plaintiff and so persuaded her with great insistance to sign the said deed of release that he wrongfully and fraudulently procured plaintiff by reason of her said distress, weakness, and sick-
22 ness, which was all well known to agent at the time, to sign the same; wherefore the same was not of her own free will, but done under duress and of no binding effect; and plaintiff further says that she had not at the time mind and memory sufficient to make a contract at law.

And plaintiff further says that the said sum of sixteen hundred dollars paid to her upon such pretended contract is wholly and by a very large sum insufficient to pay for the injuries of the plaintiff, and is a very small and insignificant sum compared thereto, and plaintiff comes and concedes and offers that the said sum may be credited as a payment upon and deducted from any sum she may be entitled to recover in this cause, and that the residue of said sixteen hundred dollars, if any, over the amount adjudged herein to her may be paid back to defendant.

And plaintiff further says that heretofore and before the commencement of this suit she tendered the said sum of sixteen hundred dollars and interest thereon at the rate of six (6) per cent. per annum from the day of the receipt of said sum by her, in lawful money of the United States, to the lawfully authorized agents of defendant.

And the plaintiff, as to the defendant's plea above pleaded, for further replication herein says *precludi non*, because at the time of the pretended execution of the deed of release in said plea mentioned she was subject to great anguish, physical and mental,
23 brought about by defendant's wrong-doing and carelessness, as charged in her declaration, and that by reason of said bodily and mental pain and suffering her mind was for the time being greatly impaired and weakened, and that she was not then

of full and sound memory and understanding, of which defendant had notice.

Plaintiff further says that heretofore and before the commencement of this action she tendered to defendant, in lawful money of the United States, the said sum of sixteen hundred dollars ($1,600.00), together with interest at the rate of six (6) per cent. per annum from the time of the receipt of said sum by her, and this she is ready to verify; wherefore she prays judgment, etc.

CREWS & OWEN,
Att'ys for Pl'ff.

(Endorsed:) Filed Nov. 23, 1889. Wm. H. Bradley, clerk.

24 Afterward, to wit, on the second day of December, 1889, came the defendant, by its attorneys, and filed in said clerk's office its demurrer and rejoinders to the replications in said entitled cause; which said demurrer and rejoinders are in the words and figures following, to wit:

In the United States Circuit Court, Northern District of Illinois, December Term, A. D. 1889.

NELLIE E. PIERCE
vs.
CHICAGO, ST. PAUL AND KANSAS CITY RAILROAD CO. } Case.

And the said defendant saith that the fourth replication of the said plaintiff to the said plea of the said defendant and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law for said plaintiff to have her aforesaid action against said defendant, and that it, said defendant, is not bound by law to answer the same, and this said defendant is ready to verify; wherefore, by reason of the iusufficiency of the said replication, the said defendant prays judgment if the said plaintiff ought to have her aforesaid action against it.

And the said defendant, as to the first replication of the said plaintiff to the said plea of the said defendant, saith that the said
25 plaintiff ought not, by reason of anything by her in that replication above alleged, to have or maintain her aforesaid action against the said defendant in respect to any of the supposed grievances and injuries in said plea and in the declaration mentioned, because the defendant saith that the said plaintiff of her own free will and knowledge and with full understanding made and sealed and has by her act and deed delivered to the said defendant the said release in said plea mentioned and not by reason or in consequence of the supposed duress in the said replication mentioned or in fear or apprehension thereof in manner and form as the said plaintiff hath in her said replication to said plea alleged, and said plaintiff was, at the time of the execution of said deed of release, of sufficient and sound mind and memory and competent to make the release and defendant was entirely free from fraud

or wrong in obtaining the same; and this the defendant prays may be inquired of by the country.

And the said defendant, as to the second and third replications of the said plaintiff to the said plea of the said defendant, says that the said plaintiff ought not, by reason of anything by her in those replications above alleged or any or either of them, to have or maintain her aforesaid action against the said defendant in respect of the said supposed grievances and injuries in the said plea and in the declaration mentioned, because it saith that the said plain-
26 tiff of her own free will made and sealed and as her act and deed delivered to the said defendant the said release in the said plea mentioned, and said release was obtained fairly and honestly by the said defendant and not by any fraud, covin, and misrepresentation of defendant or through any duress by it or its agents, and at the time of the execution and delivery of said release to the said defendant said plaintiff was not deprived of her reasoning powers, but was of sufficient sound mind and memory and was competent to make the release and understand the nature thereof when she executed and delivered it; and this the defendant prays may be inquired of by the country.

GARDNER, McFADON & GARDNER,
Att'ys for Defendant.

(Endorsed:) Filed Dec. 2, 1889. Wm. H. Bradley, clerk.

27 Afterward, to wit, on the eighteenth day of January, 1890, in the December term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY. } Case.

Now come the parties, by their attorneys, and the motion of the defendant to amend its rejoinder by striking out — word "second" before plea and the demurrer of the defendant to the fourth replication heard and sustained.

28 On the same day, to wit, on the eighteenth day of January, 1890, came the defendant, by its attorneys, and filed in said clerk's office its further rejoinder in said entitled cause; which said rejoinder is in the words and figures following, to wit:

In the United States Circuit Court, Northern District of Illinois.

NELLIE PIERCE
vs.
CHICAGO, ST. PAUL & KANSAS CITY R'Y CO. } Case.

And the said defendant, for further rejoinder as to the 1st, 2nd, and 3d replications of the plaintiff to the plea of defendant and each of them, says that the plaintiff ought not, by reason of anything in said replications, to have her action against defendant, because the defendant says that after the execution of said release by the plaintiff set forth in defendant's plea the plaintiff, when of sound and disposing mind and memory and without duress, ratified said execution by her of said release; and this defendant prays may be inquired of by the country.

GARDNER, McFADON & GARDNER,
Att'ys for Defendant.

(Endorsed:) As per order of the court of date of June 19th, 1890, this rejoinder is filed *nunc pro tunc* as of January 18th, 1890. Wm. H. Bradley, clerk.

29 Afterward, to wit, on the twenty-second day of January, 1890, came the plaintiff, by her attorneys, and filed in said clerk's office her surrejoinder in said entitled cause; which said surrejoinder is in the words and figures following, to wit:

In the United States Circuit Court, Northern District of Illinois.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL AND KANSAS CITY RAILROAD COMPANY. }

And the plaintiff, as to the rejoinder of the defendant by it secondly above pleaded, says that she, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having her aforesaid action, because she says that she did not in any way ratify or confirm the contract of release in said rejoinder mentioned in manner and form as above rejoined by defendant; and this the plaintiff prays may be inquired of by the country, etc.

CREWS & OWEN,
Att'ys for Plaintiff.

(Endorsed:) As per order of the court made herein June 19th, 1890, this surrejoinder is filed *nunc pro tunc* as of January 22, 1890. Wm. H. Bradley, clerk.

30 On the same day, to wit, on the twenty-second day of January, 1890, in the December term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY.

Now come the parties, by their attorneys, and upon issue joined herein thereupon comes a jury of good and lawful men, to wit, Samuel Rosenbaum, Joseph H. Martin, J. B. Graves, A. V. Haskins, William Lavery, J. S. Bartlett, A. J. Sherming, David Knight, Henry J. Christian, J. J. S. Wilson, Edward Donohue, and John F. McHale, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

31 Afterward, to wit, on the twenty-third day of January, 1890, in the December term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY. } Trespass on the Case.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and the arguments of the counsel, it is ordered that the further trial of this cause be postponed until to-morrow morning.

32 Afterward, to wit, on the twenty-fourth day of January, 1890, in the December term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY. } Trespass on the Case.

Now come again the parties, by their attorneys, and now comes also the jury in this behalf empaneled and sworn, and after receiving the instructions of the court the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the defendant guilty

and assess the plaintiff's damages at twenty-six thousand six hundred dollars, less sixteen hundred dollars paid by the defendant, making twenty-five thousand dollars.

33 Afterward, to wit, on the twenty-fifth day of January, 1890, came the defendant, by its attorneys, and filed in said clerk's office its motion for a new trial in said entitled cause; which said motion is in the words and figures following, to wit:

Motion for a New Trial.

In the United States Circuit Court, Northern District of Illinois.

NELLIE E. PIERCE
vs.
CHICAGO, ST. PAUL & KANSAS CITY RAILWAY CO. } Case.

Now comes defendant, by Gardner, McFadon & Gardner, its attorneys, & moves that the verdict of the jury be set aside and a new trial be granted in this case for the following reasons:

1st. The verdict is not supported by the evidence.

2nd. The verdict is contrary to the weight of the evidence.

3d. The court erred in not instructing the jury to find for defendant as defendant prayed.

4th. The court erred in his charge to the jury.

5th. The court erred in not giving each of defendant's instructions.

6th. The damages are excessive.

7th. The court erred in admitting improper evidence on behalf of plaintiff and rejecting proper evidence on behalf of defendant.

8th. The court in charging the jury erred in stating the evidence.

GARDNER, McFADON & GARDNER,
Defendant's Attorneys.

(Endorsed:) Filed Jan'y 25, 1890. Wm. H. Bradley, cl'k.

34 On the same day, to wit, on the twenty-fifth day of January, 1890, in the December term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY. } Trespass on the Case.

Now comes the defendant, by its attorney-, and files its motion for a new trial herein, and thereupon it is ordered that the hearing of said motion be postponed to a future day.

35 Afterward, to wit, on the seventeenth day of February, 1890, in the December term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY. } Trespass on the Case.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant for a new trial herein, and, after hearing the arguments of the counsel, the court takes the same under advisement.

36 Afterward, to wit, on the fifteenth day of April, 1890, came the plaintiff, by her attorneys, and filed in said clerk's office her remittitur in said entitled cause; which said remittitur is in the words and figures following, to wit:

Remittitur.

In the U. S. Circuit Court, Northern District Illinois.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL & KANSAS CITY R. R. Co. } Case.

And now comes the plaintiff, and, by leave of the court, the plaintiff remits from the verdict the sum of ten thousand dollars ($10,000.00).

CREWS & OWEN,
Pl'ff's Att'ys.

(Endorsed:) Filed April 15, 1890. Wm. H. Bradley, cl'k.

37 On the same day, to wit, on the fifteenth day of April, in the adjourned March term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Judgment.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY. } Trespass on the Case.

Now come the parties, by their attorneys, and the court, having considered and being now fully advised upon the motion of the defendant for a new trial of this cause, overrules the same upon the

plaintiff entering a remittitur of ten thousand dollars upon the verdict herein, and thereupon the plaintiff, by her attorney, enters and files a remittitur in the sum of ten thousand dollars upon said verdict, and thereupon the court overrules said motion for a new trial and awards judgment upon the verdict, less said remittitur. It is thereupon considered and adjudged by the court that said plaintiff do have and recover of said defendant the sum of fifteen thousand dollars, her damages, being the amount of the verdict entered herein, less the amount of said remittitur of ten thousand dollars, together with her costs and charges in this behalf expended,
38 amounting to — dollars and — cents, and that she have execution therefor.

And on motion of the defendant, by its attorney, thirty days is given the defendant to file a bill of exceptions herein, and the court fixes the amount of the supersedeas bond to be given by the defendant at twenty-one thousand dollars.

39 Afterward, to wit, on the first day of May, 1890, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Chicago, St. Paul and Kansas City Railway Co., as principal, and William R. Page, of Chicago, Illinois, are held and firmly bound unto Nellie E. Pierce in the full and just sum of twenty-one thousand dollars, to be paid to the said Nellie E. Pierce, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of April, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the circuit court of the United States for the northern district of Illinois, held in the city of Chicago, Illinois, in a suit depending in said court between Nellie E. Pierce, above named as plaintiff, and said Chicago, St. Paul and Kansas City Railway Company, as defendant, a judgment was rendered against the said Chicago, St. Paul and Kansas City Railway Company on the fifteenth day of April, A. D. 1890, for the sum of fifteen thousand dollars and costs, and the said Chicago, St. Paul and Kansas City Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to
40 reverse the judgment in the aforesaid suit, and a citation directed to the said Nellie E. Pierce, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Chicago, St. Paul and Kansas City Railway Company shall prosecute its writ of error to effect and answer all damages and costs

if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CHICAGO, ST. PAUL & K. C. RAILWAY CO. [SEAL.]
[SEAL.] By W. B. BENT, *Treas.* [SEAL.]
WILLIAM R. PAGE. [SEAL.]

Approved by—
W. Q. GRESHAM,
Circuit Judge.

(Endorsed:) Filed May 1st, 1890. Wm. H. Bradley, clerk.

41 Afterward, to wit, on the third day of May, 1890, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

CHICAGO, *May* 3, '90.

NELLIE E. PIERCE
vs.
CHICAGO, ST. PAUL AND KANSAS CITY R. R. Co.

We hereby stipulate & agree to ten days' further time in which to file the bill of exceptions in the above cause.

CREWS & OWEN,
Att'ys for Pl'ff, Nellie E. Pierce.

(Endorsed:) Filed May 3, 1890. Wm. H. Bradley, cl'k.

42 On the same day, to wit, on the third day of May, in the adjourned March term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY. } Trespass on the Case.

By agreement of the parties as per stipulation filed it is ordered that the time in which to file a bill of exceptions herein be extended ten days.

43 Afterward, to wit, on the twenty-second day of May, 1890, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States for the Northern District of Illinois.

NELLIE E. PIERCE
vs.
CHICAGO, ST. PAUL & KANSAS CITY RAILWAY CO. } Case.

It is hereby stipulated that the time for defendant's filing bill of exceptions in the above cause shall be extended to June 10th, 1890.

GARDNER, McFADON & GARDNER,
Att'ys for Defendant.
CREWS & OWEN, *Pl'ff's Att'y.*

(Endorsed :) Filed May 22, 1890. Wm. H. Bradley, cl'k.

44 Afterward, to wit, on the twenty-sixth day of May, in the adjourned May term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

NELLIE E. PIERCE
v.
THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY. } Case.

By agreement of the parties, as per stipulation filed herein on the twenty-second instant, it is ordered that the time for the defendant to file its bill of exceptions herein be extended until the tenth day of June next.

45 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States, Northern District of Illinois, December Term, 1889.

NELLIE E. PIERCE
vs.
THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY.

Bill of Exceptions.

Be it remembered that on the trial of the above-entitled cause, commencing on January 22nd, A. D. 1890, before the Hon. Walter

Q. Gresham, presiding as judge, and a jury, the plaintiff to maintain the issues on her part introduced the following testimony:

NELLIE E. PIERCE, the plaintiff, testified on her own behalf as follows:

Direct examination:

The accident in which I was injured occurred September 15, 1887, about 11.15 p. m., near Hudson Junction, Iowa.

It was here admitted in open court by defendant that the injuries received by the plaintiff were caused by negligence of defendant and without her negligence.

46 I was hurt in the knee and arm and my spine was injured in two places. The next day, at two o'clock, I was sent to Chicago, where I stopped at the Windsor hotel.

The last I remember about the accident I had strange feelings in my head and my limbs were very numb and cold and dead. I had very strange feelings in the back of my head, and that is about all I remember until concussion set in and chills.

When I got to Chicago I remember of feeling very strange.

It is almost impossible for me to explain how I have suffered since then up to now. I suffered every way—mentally, physically, and every way. After concussion of the spine set in I was bound up from my knee to my shoulders for over three months with hot compresses night and day. My pains were located in the lower part of my spine, between my shoulders and right knee. Since the day of the injury my right leg has pained me with sciatic rheumatism. The knee is perfectly stiff and useless and in the hip the ligaments seem to be all loose and I suffer a great deal of pain. I cannot sit up more than an hour at a time, unless I am in a reclining position, but what I am anxious to return to bed. I attempted at one time to stand up before my physicians—to raise up upon one foot and to get up on two crutches.

That was a year ago and this sciatic drew my head down and affected my stomach so that I was very sick for three days and nights.

Since then I never have straightened up fully, only to lift my body by my hands and arms during all this time.

My left leg is affected somewhat with weakness and emaciation and in the knee-pan. It sympathizes with the other. I can only hold my weight up, using my hands and arms, and if I move I have to do it with my hands and arms.

47 I have no use whatever of my right leg, nor can I even turn in bed—if I wrench the knee or where this sciatic is—but what I suffer pain for more than an hour until some restorative is applied to it. My right leg is nothing but bone and sinew—just like a dead foot—all dwindled away. I have a little feeling in it, but it is cold and clammy all the time. I never average three hours of sleep not all day unless under an opiate, and I have often gone

without that for fear it would become a disease. My physician has prescribed morphine and has been giving me perhaps one-eighth of a grain.

My head has constantly troubled me since the injury right at the base of the brain. Sometimes it lasts me for a week or more with a very strange feeling and unusual pain, and then I have at times, say two or three weeks, most excruciating neuralgia, and that is the only time I take morphine. I suffer tortures with this neuralgia in my head. Since the injury the condition of my digestion and stomach has been very bad. I don't think very much about it unless I take medicine in order to increase my appetite, and for the last two or three weeks I have been so nervous that I have scarcely eaten anything. Before the injury I could read all the finest print. Since then for four months I scarcely read a line without my nurse reading to me, and then the way I read now—five or ten minutes at a time—is by magnifying glasses—strong glasses. My age is forty-three. Before the accident I kept roomers and boarders as a business to support myself, and at the time of the injury I expected to take a position as housekeeper in a large hotel. At the time of the injury I never was in better health in my life. I weighed 149 pounds before then. I scarcely knew what a sick day was. I am a widow and dependent upon my exertions.

48 Dr. S. R. WARD, a witness for the plaintiff, testified:

Direct examination:

I am a physician in Chicago and have been practicing medicine for the last twenty years. I attended Mrs. Pierce in my capacity as doctor. The first time I saw her was the 25th of September, 1888, and from that time I treated her more or less regularly until March 1, 1889; since then I have treated her occasionally.

The first time I saw her I did not examine her, having been called in by Dr. Lyman, and I simply went to see her and to find out about her case. Three days afterwards I examined her, and from that time on I visited her, perhaps once a week or two or three times a week up to March 1, 1889, and during these visits I examined her more or less every time. I found her unable to stand. She was suffering with pains in the back and between the shoulders. The middle and lower part of the back were very tender to the touch and she was also suffering with pains occasionally through the arms and in the legs.

Over the left hip I found her also suffering with creeping sensations here and there. Her legs were cold from the knees down.

She was very cold and pale. The muscles are smaller than natural; flabby and weak. I found the right knee stiffening and a fibrous anchylosis in the knee. At times she had a good deal of headache, according to her report, and she suffered also with sleeplessness, constipation of the bowels, and a very coated tongue, indicating a bad state of digestion. I found also a very debilitated condition of the right hip-joint. She could lie upon her back and put her right foot over against the head board of the bed.

Around the right hip-joint there is quite a little of was-
49 ing of the muscles, indicating a looseness of the joint. I asked her — stand up once and I found that by a great deal of exertion with her arms and hands she could raise herself around so as to sit upon the side of the bed, and then by taking hold of a chair after awhile—quite a little while—she made out to stand by supporting herself with the chair. She suffered by standing on the left leg. Of course she could not stand on the other nor on the left leg but a moment. I found some wasting of the muscles of the left leg; it is not in its normal state; the muscles are smaller.

I could not detect any fractures or dislocations of the spinal column; it seemed normal as far as its integrity was concerned, but I found a good deal of sensitiveness along the column and along the sides of it. That would indicate an injured condition of the spine, including the spinal nerves. The desease of these nerves interferes with the general nutrition of the body, produces palpitation of the heart, which she was suffering from, neuralgic pains here and there, and a general debilitated and weakened condition of the system.

I do not think she will ever recover from the injury.

My impression from what she tells me is she is suffering most of the time from the pain in the back of her head and back and otherwise.

In describing the pains I am testifying as to what she told me.

50 Dr. JAMES A. STUBBS, a witness for the plaintiff, testified:

Direct examination:

I am a physician and have been practicing for the last twenty-seven years; I first saw the plaintiff, Mrs. Pierce, a few days after the accident at the Windsor hotel, in Chicago, between ten o'clock at night and daylight; I found her suffering intense pain, exceedingly restless, and exceedingly nervous, bordering pretty close onto delerium; she was suffering intense pain in the knee and in the back and pretty generally throughout the body; she was suffering from the spine.

I gave her a hyperdermic injection of morphine, one-third of a grain at least; I was called in to relieve her sufferings at the time and made no critical examination. A few days afterwards I was called in again to relieve her sufferings, and I think I gave her a hyperdermic injection again; the second time I saw her was about two or three days after the first, somewhat early in the morning.

I found Mrs. Pierce in an exceedingly nervous condition, very greatly excited about herself; she thought she was going to die, and it was hard to pacify her in any way, and so I gave her the hyperdermic injection to quiet her.

She was suffering intense pain and was pretty close to delerium; she also had hysteria; she was not then in any condition, physically or mentally, to transact business or enter into contracts on her own behalf; what she might have been a short time after that, of course,

I do not know. She was wild and nervous than and could not be kept still, but was not delirious; above the place where she was injured she might have been all right; the injury affected her lower limbs and would not affect the mucular system above the place where she was injured.

51 "Q. What affect would it have on the brain directly?

"A. No more than what would be from intense pain.

There would be no direct result; only the general result.

She thought she was going to die, she was in such a condition, but I told her she need not worry, as she would not die then; she was screaming and wringing her hands in intense pain.

She was that both times I saw her; I examined her again a few days ago and found that both of her limbs were very much shrunken; one knee was larger than the other and completely anchylosed—that is, immovable; there was a difference in the two limbs of an inch in circumference at the ankle and the calf of the leg; the knee was perfectly immovable and very painful; the whole muscular system from the hips down is in an atrophied condition, and all this large muscle that belongs to that part is shrunken; the spine was very sensitive and she could not bear any pressure on it, and that indicates injury to the spine.

With that condition of the spine a person would be in a nervous condition, and the general effect of that condition upon the general system might destroy nourishment or impair nourishment.

She will never recover or be a well woman from the injury.

Cross-examination:

She was afraid she was going to be killed by the injury; she told me she was injured in a railway accident; I was with her about fifteen or twenty minutes; if the paroxysms of pain abated so that there was comparative rest, then in my opinion the plaintiff would be in a condition to do business; there was no impairment which would prevent her from understanding things.

52 Dr. HENRY LYMAN, a witness for the plaintiff, testified:

Direct examination:

I began to treat Mrs. Pierce some time in December, 1887. I have examined her recently and found her in the condition described by Dr. Stubbs. She is suffering with great tenderness and pain in the back as a consequence of the progress of the disease, so that the spinal cord, nerves, muscles, and joints are all in a state of great disorganization. I do not think she will ever recover.

Counsel for defendant here said that if plaintiff was only going to prove the same thing by this physician testified to by others it was unnecessary, because defendant would introduce no testimony to prove to the contrary.

Plaintiff then rested her case.

Defendant then introduced in evidence a release of damages by the plaintiff for $1,600.00, dated September 23rd, 1887, set out in the plea; also a voucher acknowledging the receipt of the $1,600.00, dated the same day.

Both release and voucher were signed by the plaintiff, "Nellie E. Pierce."

The release was witnessed by Henry A. Gardner and John R. Hanna.

Defendant then rested.

53 NELLIE E. PIERCE was then recalled on her own behalf, and testified as follows:

Direct examination:

I do not remember of ever seeing the release and voucher before, and I do not recollect of signing them. I remember of being put up in bed and of something being placed in my lap, and that is all that I remember, as I was in such intense pain and my back and head hurt me so. I do not remember of taking a dollar. I have no recollection of anything which took place during the week following the accident except that I felt very strange in the back of my head and limbs felt cold, and I thought I was dying and begged for an examination of physicians.

Mr. Henry A. Gardner being pointed out to the witness, she testified that she did not remember of ever laying eyes upon him. Mr. Thompson being also pointed out, she testified that she did not know that she had ever seen him anywhere, but it seemed as though there was a little familiar appearance to his face.

I staid at the hotel for two or three weeks after the accident. Since the accident I have paid as much as two or three thousand dollars to doctors on account of my injury. My signature to the release and voucher looks so that I would not take oath that they were mine. They look like what my signatures were when I was able to write three or four months after I was injured, bolstered up in bed, but they look nothing like my signature before I was injured.

I remember about a paper being placed before me, and I think they asked me to do something. I thought I was dying, and I didn't care for anything only to get them away from me, and the only thing I remember of is begging for an examination of physicians.

54 Cross-examination:

I think I first learned about this release having been signed by me about a week or ten days after signing the release—that is, after the chills set in. "I was not as bad then as I was at that time." I remember talking about the matter; friends talking about it in my room. That is all I remember. My brother John might, at that time, have said something to me about it, but I do not remember anything he said. At that time, I believe, they told me that I had

gotten $1,600.00 for signing this release. I do not remember of receiving $1,600.00 or anything about it until I was told, perhaps, a week or ten days after.

"Q. But when you found that you had received the $1,600.00 what did you do with that money?

"A. It was expended for my expenses, more or less.

"Q. Did they tell you from whom you had received that $1,600 00?

"A. I believe they did.

"Q. For signing the release, wasn't it?

"A. I don't remember about any release, what was said—that is, to enter into details.

"Q. But you knew that you had signed a release?

"A. I knew what had been told to me.

"Q. They told you that you had signed the release and that the company had paid you $1,600.00?

"A. What I was told some time after—after it; yes, sir. I don't remember anything about it at all.

"Q. After you took that $1,600.00 did you expend it?

"A. I did not expend it.

"Q. But you knew it was being expended, didn't you?

"A. Most assuredly, I recollect knowing that from having my friends tell me of it, but they expended it for me—took it.
55 I don't remember anything about it.

"Q. Did you know what it was being expended for?

"A. For doctor's bills and nurses and medicine and every conceivable thing that could be thought of for the past two years or more. At least it was six months or eight months before it was exhausted, more or less.

"Q. That was the only money that you had, I suppose?

"A. The assistance of my brothers.

"Q. But you, personally—that was the only money that you had?

"A. The only money that I had; yes, sir.

"Q. When you found that that $1,600.00 was being expended in that way you didn't make any objection, did you?

"A. Why should I make objection when it was in other people's hands to do what they pleased with it—to do what they thought best?

"Q. You knew that the money was paid to you, that it belonged to you?

"A. By what I was told. I don't remember anything about it. Before I signed the release I saw Mr. Thompson about the examination of physicians. I do not remember anything else I said to him except about such examination, nor do I remember what he said to me. The examination of physicians was to ascertain how badly I was injured--if I was going to die. I supposed Mr. Thompson had come down to see how badly I was injured. I don't remember of having any conversation with my brother John prior to the signing of the release about settling my claim against the railroad company. All I remember of before that time is begging for the examination of physicians. Everything else seemed to be a blank to me. I have no remembrance that I can repeat to you of

having a conversation with any one before signing the re-
56 lease about settling my claim against the railroad company. I only remember of having something to say about an examination of physicians, and it might have been Mr. Thompson that I said this to, perhaps, a week before the day the release was signed.

"Q. With reference to the settlement of your claim against the company determining the amount of the injury?

"A. It might have been, but what was said I have no remembrance of at all." I have no recollection of being told before signing the release that there were parties on behalf of the company around to see me about settling. They told me that about a week or ten days after the release was signed, I think when the matter was talked up and talked over so seriously. That is all I remember. I don't remember of having any conversation with Mrs. Young before signing the release about the settlement, or with anybody else in reference to the matter until a week or ten days afterwards.

As soon as I came to Chicago I remember of sending for Dr. Baxter, and I remember of his coming the Saturday after. I came to Chicago from the place where the accident happened over the road of the Chicago, St. Paul & Kansas City. When I came to Chicago my brothers met me and took me in a carriage to the hotel. Friends to whom I gave my brother's address telegraphed them that I was coming. I remained at the hotel two or three weeks and then went over on the north side of the river.

57 CORNELIUS MACKENZIE, a witness for the plaintiff, testified as follows:

Direct examination:

I saw Mrs. Pierce between one and two o'clock in the afternoon on Friday, September 23, 1887, at the Windsor hotel. She was very nervous and flighty. I have known her for eighteen years; and she could not carry on a conversation when I saw her as she did before the injury, because she was too nervous to do so. The least sound would excite her. I don't know as her mind was unsound. I don't know what her conversation was on. She talked and seemed to be perfectly rational for a little while and then she would get kind of flighty and then soothe off. She complained about the back of her head. I sat down and talked with her. I sat there for quite awhile, for an hour or two; maybe longer than that.

Cross-examination:

I know it was the day the release was signed by Mrs. Pierce, because when I came I was told by her brother, John Hanna, that she had signed a release, and he told me how much money she had got from the railroad company. I suppose Mrs. Young, who was Mrs. Pierce's nurse, also said something to me about it. I may have staid two hours in the room and then I went away and came back again.

"Q. While you were in the room did you talk with her brother about this release?

"A. I don't know that I did; I could not say.

"Q. Did you talk with Mrs. Young about that release?

"A. I don't know that I did.

"Q. Did you talk with Mrs. Pierce a good deal?

"A. I talked with Mrs. Pierce; yes.

"Q. Didn't you talk with her about the release?

58 "A. I might have done so; yes, sir."

I called again the same evening to see Mrs. Pierce and I had a conversation with her. I was there and talked with her and she answered me, but I don't remember what we talked about that evening.

Miss M. L. ALLEN, a witness for the plaintiff, testified as follows:

Direct examination:

I have known Mrs. Pierce for about six years. I boarded with her and lived in her house for one year; have seen her frequently since the accident. I saw her Monday after the accident.

During that week I saw her every day and sometimes twice a day. She was in a low condition. She was very hysterical all the time and nervous and talked about her accident almost exclusively.

I will ask you, Miss Allen, to state whether she was in a mental condition during the times that you saw her that week to appreciate the importance or realize the importance of any business transaction whatever.

(Objected to by defendant. Objection sustained, and exception by plaintiff.)

59 JOHN HANNA, a witness for the plaintiff, testified as follows:

Direct examination:

I am a brother of the plaintiff and was present when she signed the release. I signed my name as witness. When my sister signed her name she was not in a sound condition of mind.

Mr. Gardner and Mr. Thompson were in the room at the time, representing the railroad company, defendant. They were there about fifteen minutes. I signed my name to a paper at the solicitation of Mr. Thompson to show that my sister had received the $1,600.00. I had no idea how bad my sister was hurt, and never had any experience in the business of a settlement. I considered at that time that my sister was not in a sound mind, and when she signed the paper I looked at her and shook my head at her and she paid no attention to me.

Mr. Gardner and Mr. Thompson knocked at the door and the door was opened and they came in. Mr. Thompson then sat down on the bed and told my sister that he had come to make a reasonable settlement with her and pay her some money. He talked with her

not longer than five or ten minutes before a settlement was concluded. At the end of the talk they raised her up, put a paper before her and the pen in her hand, and she scribbled her name on it. The paper was not read to her.

They put down the money on the bed, took the paper, and walked off.

My sister did not touch the money, but I took it to the First National bank and put it on deposit. She gave me no directions about it at all. All she said to Gardner and Thompson was that she wanted an examination of the physicians, as she thought she was going to die.

She said she wanted to get this thing away to get it off her mind.

Before Mr. Thompson came to my sister's room I saw him at the Grand Pacific hotel and told him that Dr. Baxter, my sister's doctor, would be ready to have an examination, but would not
60 act as arbitrator for us in the matter of a settlement, and had referred us to an attorney. Mr. Thompson then said that there was no use of having an attorney, but if he could only see my sister one minute he could settle up the matter without one. I told Mr. Thompson my sister was very poorly; that her condition was very bad that morning, and that I had had to call a physician that morning.

He asked me to go and persuade her to let him see her; that he felt as though he would treat her right. I told Mr. Thompson that she was very sick and had passed a very bad night. Mr. Thompson said, If you can persuade her to allow me to see her for a few minutes I could get her to make a settlement; we can settle this thing so as to be satisfactory without bringing any attorney into the matter. He talked very fine and plausible. I told him I would go over and see my sister, and I did so, and told her he wanted to come here, but she paid no attention to me, and I took the thing upon myself and let him come over.

My sister never authorized me to act as agent for her in the matter of a settlement, but only to get an examination of physicians to see whether she was going to die. Dr. Stubbs, who was there, saw my sister about three or four o'clock in the morning.

Cross-examination:

I was about twenty-eight years old at the time the release was signed and had been in business before that time.

"Q. When the $1,600.00 was paid down what did you suppose it was?

"A. I supposed it was for a settlement.

"Q. When he asked you to sign this paper what did you suppose it was for?

"A. As a witness that she had received that sum of money.

"Q. Didn't you suppose that this paper was a settlement paper?

61 "A. Why, yes; I supposed it was something of that sort; yes, sir.

"The COURT: I understood you to say that you signed it not knowing what it was, and you say your sister signed it not knowing what it was.

"A. I did; yes, sir.

"Q. What do you say now?

"A. I say I didn't know whether it was a settlement or not when I put my signature to it.

"Q. What did you understand it was at the time that you signed it?

"A. That she had received this sum of money. He asked me to witness it. I went over to the Grand Pacific hotel to see Mr. Thompson about an examination of physicians. He wanted some one to see how badly hurt my sister was for the purpose of settling up her claim for damages. Dr. Baxter did not want us to make a settlement until he knew how badly my sister was hurt, and he said he could not tell how badly she was hurt until a week or ten days had passed.

"No examination of physicians was made before my sister signed the release."

The plaintiff then rested.

JOHN THOMPSON, a witness for the defendant, then testified as follows:

Direct examination:

During September, 1887, I was general solicitor for the Minnesota and Northwestern and the Chicago, St. Paul & Kansas City Railway Companies. I first saw Mrs. Pierce at the Windsor hotel on Tuesday following the accident, and then again twice on Friday.

I saw her Tuesday about my selecting a physician to make an examination with her physician of her injuries. Mrs. Pierce said she would like to have that done. I do not remember of anything being said with reference to a settlement except as laying a foun-
62 dation or a basis to know her injuries as a basis for settlement. We did not talk much, but she talked rationally and very bright.

On Friday afternoon I went with her brother from the Grand Pacific to see her. He came over to get me. I was there then about ten or fifteen minutes, and there was a proposition made by her how much she wanted. She said she would like to settle the case. First she wanted $2,700, then $2,000, then $1,800. I offered her $1,600 and she accepted my proposition. I then went to the bank and then in the afternoon I went and got Henry A. Gardner and took him with me to Mrs. Pierce's room, where she signed the release. The release was read to her in the presence of her nurse, her brother, and Mr. Gardner. She signed it and the voucher also, and Mr. Gardner and her brother witnessed her signature. She talked perfectly coherently and understandingly at that time.

She told me she preferred to have the matter settled.

She was lying in bed, of course, and was bolstered up. A book

was put in front of her. The nurse got her a pen and ink, she signed the document, and I handed her the money.

She thanked me when it was all over and seemed to be very much pleased.

Cross-examination:

On Monday after the accident I came to Chicago from St. Paul, Minnesota, to settle the plaintiff's claim.

Mrs. Pierce wanted an examination of physicians, but no examination was made before she signed the release.

The morning of the day the release was signed Mr. Hanna came to the Grand Pacific hotel, and during our conversation about the settlement of his sister's claim he said substantially that Dr. Baxter had recommended that he get his lawyer. It was in connec-
63 tion with Dr. Baxter's acting as arbitrator. I did not tell him that he did not need an attorney, nor that if he would let me see his sister I would settle her claim very soon. I may have told her brother that it was unnecessary for them to get an attorney if we could agree.

HENRY A. GARDNER, a witness for the plaintiff, testified as follows:

My name is Henry A. Gardner; I am a lawyer and have been practicing law in Chicago; am attorney for defendant. I first saw Mrs. Pierce at the Windsor hotel in Chicago more than two years ago.

I was told one morning that a settlement had been made with Mrs. Pierce for injuries received on defendant's railroad and was requested to go in the afternoon to witness the payment of the money on the settlement. The time fixed was three o'clock. It might have been two o'clock, but I am quite certain it was three. At that time Mr. Thompson called at my office and together we went to the Windsor hotel. We went directly to Mrs. Pierce's room, knocked at the door, and was immediately admitted. There was present besides Mrs. Pierce, Mrs. Young, the nurse, Mrs. Pierce's brother John, Mr. Thompson, and myself. I was introduced to Mrs. Pierce. The room had the appearance of having been put in order. Everything was neat and clean.

Mrs. Pierce was bolstered up in bed with pillows behind her.

We talked to Mrs. Pierce a few minutes, asking her how she was feeling, etc., and then Mr. Thompson took the receipts which have been introduced in evidence from his pocket, they having been already prepared, and read them to Mrs. Pierce, after which the nurse gave Mrs. Pierce a book to rest the receipt upon and a pen.

Mrs. Pierce signed both receipts. Mr. Thompson then took
64 the money in currency from his pocket and, handing it to Mrs. Pierce, requested her to have it counted. Her brother, John Hanna, took the money, counted it, and then with me signed the receipts, with me as a witness. We then conversed with Mrs. Pierce for a few minutes, saying we hoped she would soon recover.

I said it was better to settle these matters this way than to have a lawsuit. John Hanna handed me a card of a firm of lawyers having their office in the Home Insurance building, of which firm Francis A. Riddle was a member, who claimed to have special facilities for settling such matters as Mrs. Pierce's, and said it had been sent to their room.

Mrs. Pierce talked in a perfectly rational manner during my visit.

By stipulation between the attorneys it was admitted that on September 1, 1888, a suit was commenced by the plaintiff against defendant railway company to recover for damages on account of her injuries sustained in the aforementioned accident; that the suit was commenced by the plaintiff without offering to return the $1,600 which defendant paid her for the release; that this suit was dismissed and in August, 1889, and before the commencement of this suit, a tender was made by the plaintiff to the defendant of said $1,600, with six per cent. interest from September 23, 1887.

JOHN HANNA, recalled on behalf of the defendant, testified as follows:

When I took the money over to the First National bank, it was either $1,500 or $1,600, I didn't tell my sister what I was going to do with it. I deposited the money in said bank in her name. They asked me to get her signature in the deposit book of the bank, and I went back and got her signature on a piece of paper and took it to the bank and pasted it in the deposit book. I told her why I wanted to have her signature on the paper. I did not get
65 it unless she gave some recognition that it was there.

The deposit book of said bank was introduced in evidence showing the signature of the plaintiff therein, "Mrs. Nellie E. Pierce," and the plaintiff's counsel admitted the signature to be that of the plaintiffs.

Mrs. J. B. YOUNG, a witness for defendant, testified as follows:

Direct examination:

I am a nurse by profession. I have known Mrs. Pierce for thirty-five years. I was called in to nurse her at the Windsor hotel as soon as she came to Chicago after the accident, and I was there three weeks with her. I was present in the room when she signed the release.

Mr. Gardner and Mr. Thompson came in with John Hanna and said they came to make a settlement, and they talked the matter over—that is, Mr. Thompson did—with Mrs. Pierce. They agreed to settle for $1,600. Before that time Mr. Thompson had called twice to see Mrs. Pierce, once in the morning of the day the release was signed and once previously. Mr. Thompson was first there one afternoon to get an examination made, but Mrs. Pierce was so ill that he went away.

Mr. Thompson was in the room in the morning of the day before the release was signed. He talked with her about settling, but there was no disagreement about the matter. She at once agreed to take what Mr. Thompson offered, namely, $1,600. She did not demand any more.

She talked with Mr. Thompson in a perfectly rational manner; only she was very nervous, but she was just as sound in her mind then as I am now. In the afternoon when Mr. Gardner and Mr. Thompson called she was perfectly rational; only she was nervous.

66 After Mrs. Pierce got the $1,600 she did not tell me what she was going to do with it. Her brother and she talked about it, but I never had any conversation about the matter. I heard her brother and her talk about spending the money. She wanted him to find out her hotel bills. He did so, and she gave him the money to pay them. Then he went to see what the hospital bill was, and she gave him the money to pay that. She asked Dr. Baxter his bill. He told her, and she herself paid him the money, $100. About a week after the settlement Mrs. Pierce bought one dressing gown to make herself comfortable.

Cross-examination:

Witness was asked if, after the release was signed and on the same day, she did not say to Miss Allen, "Nellie has settled with the lawyers and is perfectly worn out. The lawyers have worried her nearly to death, and, unless she conquers the extreme nervousness and ceases worrying and that continual thinking, she will break down mentally."

Witness replied: "I don't remember any such conversation at all."

She was also asked if, at the same time, she did not say to Miss Allen, "I can hardly get along with her, but I realize that she is not responsible for her actions and so I try to put up with her whims and fancies and little fault-findings." Witness replied: "I never said it in that way. I may have said that she was nervous and fidgety and hard to get along with." Witness was asked if she did not say to Miss Hanna, April 28, 1889, that when Mrs. Pierce made the settlement she was not in her right mind, and that if she would go on the other side they would pay her well for it, and that if she did go on the other side she would swear as much as she could for Mrs. Pierce. Witness replied: "No."

"Q. Now, Mrs. Young, I will ask you if, yesterday, in the
67 hall of this court-house, in the presence of Mr. Hanna, of Mr. Mackenzie, Mrs. Abbott, and Mrs. Fox, you did not then and there and at that time and place say that Mrs. Pierce, at the time of the settlement, was hysterical and out of her head. A. No, sir. I said she was hysterical.

"Q. And out of her head? A. No, sir; I did not.

"The COURT: When?

"Mr. OWEN: On the day of the settlement.

"Q. That she was hysterical and out of her head that morning; that you could not do anything with her?

"A. No; I said she was very hysterical. I didn't say she was out of her head.

"Q. I will ask you if you did not say to William Hanna, brother of Mrs. Pierce, at the Windsor hotel, before she left there—during that time—at the time the settlement was made—that Mrs. Pierce was hysterical and out of her head and she seemed not to be responsible for what she did.

"A. I said that she was hysterical.

"Q. Before you make an explanation, answer the question yes or no, then you can make any explanation you please.

"A. I said that she had hysterical fits, but I didn't say she was out of her head.

"Q. Had hysterical fits?

"A. Yes, sir; she was very hysterical and very nervous: could not expect to be otherwise, because she suffered a great deal.

"When Mrs. Pierce signed the release I shook my head at her, as I didn't want her to sign it, as I thought she could get more money out of the railroad company. Prs. Pierce and I had a slight quarrel because I left her to take care of my son's family, which was ill. She didn't discharge me. After the quarrel I saw her and we were perfectly good friends again."

68 Redirect examination:

I think it was Thursday night about one o'clock that Mrs. Pierce had hysteria. It was the night before she signed the release, I think, and she sent for Dr. Stubbs. That hysteria did not continue into the morning, nor did it return again during the day before the release was signed. It returned again the night after the settlement, I think. I was there early Friday morning when Dr. Stubbs gave the opiate. She was rational enough in the morning and ate her breakfast. The Doctor administered the opiate about half past one. Mr. Thompson came about ten o'clock, and it was before that time that Mrs. Pierce had her breakfast. Mrs. Pierce was hysterical after Doctor Stubbs saw her off *on* on every day or two.

I had a number of conversations with Mrs. Pierce before she signed the release. I told her to wait, but she said she was in need of money—had to have money to pay her bills.

During 1889 I remember of John Hanna's coming to see me and taking me down to talk with Mrs. Pierce. It was in the fall, I think.

Mrs. Pierce talked very friendly and acted as though she was glad to see me.

Defendant then rested.

Thereupon Miss M. L. ALLEN was called as a witness for the plaintiff and testified as follows:

Mrs. Young told me that Mrs. Pierce had settled with the lawyers and that they had worried her nearly to death, and that she would

soon break down mentally. She also said that she could hardly get along with her, but realized that she was not responsible for her actions, and so she tried to put up with her whims and fault-findings.

69 EMMA HANNA, a witness for the plaintiff, testified as follows:

Mrs. Young told me April 28th or 29th, 1889, that Mrs. Pierce was not in her right mind to transact any business when she signed the release.

Mrs. Young, April 28th, 1889, said to me that when Mrs. Pierce made the settlement she was not in her right mind, and that if she would go on the other side they would pay her well for it, and that if she did go on the other side she would swear as much as she could for Mrs. Pierce.

"Q. I will ask you if yesterday, in the hall out here, Mrs. Young came out to where you were standing and Mrs. Fox and Mr. MacKenzie and others and if she said in substance this: That Mrs. Pierce on the day of the settlement was hysterical and out of her head, and that on the day of the settlement she could not do anything with her.

"A. Yes, sir."

70 Mrs. J. FOX, a witness for the plaintiff, was asked:

I will ask you if you were in the hall of this court-house yesterday when Mrs. Young came up to a party of people standing there—Miss Hanna, Mr. MacKenzie, yourself, and one or two others—and if she said, in substance, these words—said that Mrs. Pierce was hysterical and out of her head that morning of the settlement and said she could not do anything with her—in substance, that.

A. Yes, sir; she said she had the hysterics and could not do anything with her. Yes, sir; she said she had the hysterics and she could not do anything with her. She did not want her to sign the paper.

Mrs. YOUNG: I didn't say she was out of her head.

Mr. MACKENZIE, a witness for the plaintiff, was asked:

Direct examination:

"Q. You were sworn yesterday. I will ask you if you were present yesterday in the hall of this court-house in company with Mrs. Fox, Miss Hanna, and others, and if Mrs. Young came up to where you were all standing and if she said, in substance, this: that Mrs. Pierce was hysterical and out of her head that morning of the settlement, and that she could not do anything with her.

"A. She did."

71 WILLIAM HANNA, a witness for the plaintiff, testified:

"My brother and I were assisting my sister with money while she was at the Windsor hotel. We gave her enough to pay her necessary expenses."

"Q. I will ask you if Mrs. Young, the nurse, did not say to you during the week that your sister was hurt there and during the week this alleged settlement is said to have taken place at the Windsor hotel in this city, if she did not say to you that Mrs. Pierce was hysterical and out of her head, and that she seemed not to be responsible for what she said.

"A. She did so.

"Q. She did say that to you?

"A. She did."

The plaintiff, Mrs. NELLIE PIERCE, a witness on her own behalf, testified—

That she discharged Mrs. Young as a nurse. On cross-examination she admitted that since then Mrs. Young had called at her house, and that she had talked with Mrs. Young and spoken to her in a friendly manner.

The foregoing is all the evidence.

The evidence being concluded, thereupon the defendant, by its counsel, immediately moved that the court instruct the jury to find for the defendant—

First. On the ground that the evidence showed that the settlement was made and the release executed by the plaintiff when in full possession of her faculties and realizing the nature of her act.

Second. That the evidence showed that even if the release was not so executed, yet the plaintiff subsequently, when informed of the execution of the release by her, expended the money received from the railroad company for it and thereby ratified and confirmed the release. But the court denied said motion of defendant and refused to instruct the jury to find for the defendant; to which

71½ decision of the court in denying said motion defendant, by its counsel, then and there excepted; and thereupon the court instructed the jury as follows:

"If, however, the plaintiff has satisfied you by the preponderance of the evidence that she was induced to enter into the settlement when her mind was so far weak-ned as not to comprehend the nature and force of what she was doing, or that while she was nervous, hysterical, and afflicted with severe pain and indifferent to what she did she was induced by the defendant's counsel, they knowing her condition and intending to take advantage of her, to enter into the settlement and sign the release without being fully informed of its contents, she is not concluded by it."

Defendant, by its counsel, then and there excepted specifically to that part of the foregoing which submitted to the jury the theory of defendant's counsel knowing the condition of the plaintiff and intending to take advantage of her and inducing her to enter into the

sett-ement and sign the release without her being fully informed of the contents, on the ground that there was no evidence in the record authorizing the submission of this theory of the case to the jury.

The court also instructed the jury that "if the plaintiff signed the release when she was agitated and afflicted with pain, hysterical, nervous, and indifferent as to the results, and that, knowing her condition, the defendant, by its counsel, overreached her, importuned her, and induced her to enter into the settlement without enabling her to understand fully what she was doing, then the release would be voidable."

Defendant, by its counsel, then and there duly excepted to said instruction on the ground that there was nothing in the evidence justifying the submission of this theory to the jury.

72 The court, after giving said instructions above quoted, then further instructed the jury as follows: "The nurse in charge of the plaintiff, who appeared as a witness for the defendant, testified that when the plaintiff signed the release she was agitated and hysterical, but in possession of her mental faculties, as the witness believed."

Counsel for defendant at once asked the court to correct this statement to the jury and informed the court that the plaintiff's nurse had not testified that the plaintiff was hysterical at the time when the release was signed by her, but the court replied, "That is still my recollection. If I am mistaken in that, the jury will take the testimony as they recollect it."

Defendant then and there excepted to the court's statement that the nurse testified plaintiff was hysterical when signing the release.

The court also instructed the jury as follows: "Shortly after the settlement the money paid, less one hundred dollars, was deposited in the First National bank in the plaintiff's name and to her credit. $100.00 was paid for board, medical services, and other necessary expenses, and the amount deposited in the bank all went in the same way on checks signed by the plaintiff. If, fully comprehending the terms of the settlement and when and how she obtained the $1,600, she subsequently expended all or any part of the money, that amounted to an affirmance of the settlement, and if the settlement was once affirmed it could not be subsequently disaffirmed.

"If, however, you believe from the evidence that the money was expended by the plaintiff or by others for her use and benefit while she was yet mentally incapable of comprehending the nature of the settlement, then its disbursement did not constitute a ratification of the settlement."

73 To the last sentence of said instruction, which submitted to the jury the question whether the plaintiff was not mentally capable of comprehending the settlement while spending the money, defendant, by its counsel, then and there excepted on the ground that there was no evidence to justify the submission of this question to the jury.

After the instruction of the court had been given to the jury the jury brought in a verdict finding the defendant guilty and assessing

the plaintiff's damages at $26,600, less $1,600 paid by the defendant to the plaintiff for the release.

Upon the coming in of said verdict defendant, by its counsel, then and there moved the court to set aside said verdict and grant a new trial in said case—

First. On the ground that the court erred in refusing to give the instruction asked for by defendant.

Second. For the giving of erroneous instructions, to which defendant had duly excepted, as before shown.

Third. On the ground the damages were excessive.

But the court denied said defendant's motion for a new trial in said case on said plaintiff's remitting $10,000.00 on the verdict; to the denial of which motion said defendant then and there duly excepted.

And forasmuch as the matters above set forth do not fully appear of record the defendant tenders this his bill of exceptions and prays that the same may be signed and sealed by the judge of this court; which is done accordingly this 24th day of May, A. D. 1890.

W. Q. GRESHAM. [SEAL.]

(Endorsed:) Filed May 24, 1890. Wm. H. Bradley, clerk.

74 Afterward, to wit, on the nineteenth day of June, in the adjourned May term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

NELLIE E. PIERCE
vs.
CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY. } Case.

It appearing to the court from the statements of the attorneys for the plaintiff as well as for the defendant in this case and from the court's recollection that on January 18, 1890, the defendant, by its attorneys, obtained leave of this court to file an additional rejoinder to the replication of the plaintiff, and that an order of this court was made granting said defendant leave to file said additional rejoinder, which order, through inadvertence of the clerk, was never entered of record; and it further appearing from statements of attorneys of both parties that the said defendant on January 18, 1890, immediately after obtaining such leave of court, filed said additional rejoinder in this court, and that on January 22nd the plaintiff, by her attorneys, filed her surrejoinder to said additional rejoinder
75 of defendant, and from the inadvertence of the clerk of this court said additional rejoinder and surrejoinder were marked as filed January 24, 1890:

Now, therefore, it is ordered, plaintiff, by her attorneys, objecting on the ground that the record cannot be amended after the expiration of the December term of said court and after the bill of exceptions is filed and the record made up for the Supreme Court of

the United States, that an order be entered in this case *nunc pro tunc* as of January 18th, 1890, that defendant have leave to file said additional rejoinder.

It is further ordered that the clerk of this court mark said rejoinder as filed January 18, 1890, and said surrejoinder as filed January 22, 1890.

To the ma-king of which said order and to alteration of the said record and to the marking of said rejoinder as filed January 18, 1890, the said plaintiff, by her counsel, in open court object and at the time except thereto.

76 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Nellie E. Pierce is plaintiff and The Chicago, St. Paul and Kansas City Railway Company is defendant, as the same appears from the records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said —, at my office, in Chicago, in said district, northern division, this nineteenth day of June, 1890.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

WM. H. BRADLEY, *Clerk.*

77 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between Nellie E. Pierce, plaintiff, and Chicago, St. Paul and Kansas City Railway Company, defendant, in an action of trespass on the case, a manifest error hath happened, to the great damage of the said Chicago, St. Paul and Kansas City Railway Company, defendant, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1890, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal of Circuit Court U.S., Northern Dist. Illinois, 1855.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th year.

WM. H. BRADLEY,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

[Endorsed:] Supreme Court of the United States. Chicago, St. Paul and Kansas City Railway Company, plaintiff in error, *vs.* Nellie E. Pierce, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office, U. S., northern district of Illinois.

78 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, Seventh Circuit, }

To Nellie E. Pierce, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1890, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein you are defendant in error and The Chicago, Saint Paul and Kansas City Railway Company is plaintiff in error, to show cause, if any there be, why the error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, circuit judge of the United States for said circuit, at Chicago, this thirtieth day of April, in the year of our Lord one thousand eight hundred and ninety.

W. Q. GRESHAM.

79 [Endorsed:] Supreme Court of the United States. Chicago, Saint Paul and Kansas City Railway Co. *vs.* Nellie E. Pierce. Citation to October term, A. D. 1890. We hereby accept service of the within writ. Crews & Owen, att'ys for pl'ff, Nellie E. Pierce. In the circuit court of the United States for the northern district of Illinois.

80 In the Supreme Court of the United States, October Term, 1890.

CHICAGO, ST. PAUL & KANSAS CITY RAILWAY CO., Plaintiff in Error, *vs.* NELLIE E. PIERCE, Defendant in Error.	Error to the Circuit Court of the United States, Northern District of Illinois.

Assignment of Errors.

Now comes the said plaintiff in error, by Gardner and McFadon, its attorneys, and says that in the record of proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

The circuit court of the United States for the northern district of Illinois erred in not instructing the jury to find in favor of defendant in the court below as prayed for by it.

II.

Said court erred in instructing the jury as follows:

"The nurse in charge of the plaintiff, who appeared as a witness for the defendant, testified that when the plaintiff signed the release she was agitated and hysterical, but in possession of her mental faculties, as witness believed."

81 And in refusing to correct said statement of said nurse's evidence when informed by defendant in error that the nurse had not testified plaintiff was hysterical when signing the release.

III.

The said court erred in instructing the jury as follows:

"If, however, plaintiff has satisfied you by the preponderance of the evidence that she was induced to enter into the settlement when her mind was so far weakened as not to comprehend the nature and force of what she was doing, or that while she was nervous, hysterical, and afflicted with severe pain and indifferent to what she did she was induced by defendant's counsel, they knowing her condition and intending to take advantage of her, to enter into the settlement and sign the release without being fully informed of its contents, she is not concluded by it."

Because there was no evidence whatever tending to sustain the theory of defendant's counsel knowing the condition of the plaintiff and intending to take advantage and inducing her to enter into the settlement and to sign the release without her being fully informed of the contents.

IV.

The said court also erred in instructing the jury as follows:

"If the plaintiff signed the release when she was agitated and afflicted with pain, hysterical, nervous, and indifferent as to the results, and that knowing her condition the defendant, by its

82 counsel, overreached her, importuned her, and induced her to enter into the settlement without enabling her to understand fully what she was doing, then the release would be voidable."

Because there was nothing in the evidence tending to show that the defendant's counsel, knowing her condition to be hysterical, nervous, agitated, and indifferent, importuned plaintiff and induced her to sign the release without enabling her to understand what she was doing.

V.

The said court also instructed the jury as follows:

"Shortly after the settlement the money paid, less one hundred dollars ($100.00), was deposited in the First National bank in plain-

tiff's name and to her credit. The one hundred dollars ($100.00) was paid for board, medical services, and other necessary espenses, and the amount deposited in the bank all went in the same way on checks signed by plaintiff. If, fully comprehending the terms of the settlement and when and how she obtained the $1,600.00, she subsequently expended all or any part of the money, that amounted to an affirmance of the settlement, and if the settlement was once affirmed it could not be subsequently disaffirmed. If, however, you believe from the evidence that the money was expended by plaintiff or by others for her use and benefit while she was yet mentally incapable of comprehending the nature of the settlement, then its disbursement did not constitute a ratification of the settlement."

Said court erred in the last sentence of said instruction which submitted to the jury the question whether the plaintiff was
83 not mentally capable of comprehending the settlement while spending the money, because there was no evidence to show that she was not mentally capable of comprehending the settlement while spending the money.

Wherefore the Chicago, St. Paul & Kansas City Railway Company prays that the judgment of said circuit court of the United States for the northern district of Illinois may be reversed.

CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY,
By GARDNER & McFADON, *Its Att'ys.*

GARDNER & McFADON,
Att'ys for Plaintiff in Error.

Endorsed on cover: Case No. 14,107. N. Illinois C. C. U. S. No. 396. The Chicago, St. Paul & Kansas City Railway Company, plaintiff in error, *vs.* Nellie E. Pierce. Filed August 20, 1890.

Office Supreme Court U. S.
FILED.
SEP 25 1893
JAMES H. McKENNEY,
CLERK.

RECORD, CASE No. 14,107.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

TERM No. 153

THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

NELLIE E. PIERCE, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

HENRY A. GARDNER,
WILLIAM McFADON,
ATTORNEYS FOR PLAINTIFF IN ERROR.

RECORD, CASE No. 14,107.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

TERM NO.....

THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

NELLIE E. PIERCE, DEFENDANT IN ERROR.

STATEMENT OF CASE.

The defendant in error brought suit in the Circuit Court of the United States for the Northern District of Illinois, against the plaintiff in error, on the third day of September, 1889.

The declaration is in case and seeks a recovery against the plaintiff in error for an injury to defendant in error on the fifteenth day of September, 1887, at Hudson City, in the state of Iowa, while she was being carried as a passenger on a train of plaintiff in error from Marshalltown, Iowa, to Chicago.

The declaration contains two counts; each count charges the plaintiff in error with being guilty of negligence in the moving and running of its locomotive and trains, by reason of which, the plaintiff while a passenger on a steam railroad extending from Marshalltown, Iowa, to Chicago, and owned and operated by the plaintiff in error, on September 15th, 1887, at 11 P. M., while in a sleeping berth, was injured by a collision at Hudson, Iowa.

To the declaration of the defendant in error, the said plaintiff in error, the defendant below, filed its plea, setting out that after the several supposed causes of action alleged in the declaration had arisen and before the commencement of the suit, to-

wit, on September 23, 1887, the said plaintiff, the now defendant in error, for the consideration of sixteen hundred dollars, paid by the Minnesota & Northwestern Railroad Company, had released and discharged the Chicago, St. Paul & Kansas City Railroad Company from all claims or demands on account of the injuries which she has received. (R. 14 to 16.)

To this plea of release the defendant in error filed four replications; the first one of which sets out in substance and effect as follows: That at the time of the execution of the release in the plea mentioned, the plaintiff was suffering great agony of body and mind from her injury to such an extent that she was deprived of her reasoning powers; that at that time a paralysis of her lower limbs from the injuries aforesaid had commenced to affect her, and she thought at the time she was dying, and she was, by reason of her distress and terror and being under fear of death and on account of the effect it had on her mind, of insufficient and unsound mind and memory and incompetent to make a contract; that believing herself then dying and by her sickness, distress and fear of death, greatly weakened in mind and will, which was well known to the defendant, she had not the strength of will to protect herself; and desiring at any cost to get persons, except her nurse and family, out of her room, the agent of the defendant, well knowing the premises, taking advantage of her said weakened and distessed condition, by reason of his superior strength and will, overreached plaintiff and so persuaded her and so pressed her with great insistence to sign said deed of release, that he wrongfully and fraudulently procured plaintiff, by reason of her said distress, weakness and sickness, to so sign the release; wherefore, the same was not her voluntary act of her own free will, but done under duress and of no binding effect; that the sum of sixteen hundred dollars paid her on such release contract, was an insufficient sum to pay for her injuries, and she asks that that amount be credited and deducted from the sum she is entitled to, and offers, if less than sixteen hundred dollars be awarded her, to pay back the difference between that and the sixteen hundred dollars paid her; that she made a tender of sixteen hundred dollars with six per cent interest from the date of receipt by her to the resident attorney and counsel of the defendant at Chicago, as also to the general passenger agent and freight agent of said defendant in Chicago; the president, vice president and general manager not residing in Chicago. (R. 18-19).

The second replication omits the averment that the defendant knew the facts set out and that the defendant was guilty of overreaching the plaintiff, and sets out that plaintiff was at time of signing the release mentally incapable of contracting, but otherwise this replication is substantially like the former one in its averments. (R. 20).

The third replication to the plea of release is substantially a repetition of the allegations of the first replication above mentioned. (R. 22).

The fourth replication to said plea of release seeks to avoid the release by saying, that at the time of its execution the defendant in error was subject to great anguish and distress, brought about by defendant's wrong doing and carelessness as charged in the declaration, and that by reason of said bodily and mental pain and suffering her mind was for the time being greatly impaired and weakened, and that she was not of full and sound memory and understanding, of which the defendant had notice and avers a tender of sixteen hundred dollars before the suit was brought. (R. 23).

The plaintiff in error demurred to the fourth replication, (R. 24), and the demurrer was sustained. (R. 27).

Issue was taken on the first, second and third replications. (R. 25 and 26).

A further rejoinder to each of the said three replications was filed by the defendant in error (R. 28) setting up and alleging that after the execution of said release by the defendant in error, set forth in said plaintiff's in error plea of release, and when defendant was of sound mind and memory and without duress, she ratified the execution by herself of said release.

The defendant in error, the plaintiff below, filed surrejoinder to said last named rejoinder, taking issue on the averments of ratification (R. 29), and concluding to the country.

On the issues as above stated the case was tried by a jury January 23d and 24th, 1889, before Hon. Walter Q. Gresham, circuit judge. The verdict of the jury rendered upon such trial found the defendant guilty and assessed the plaintiff's damages at twenty-six thousand six hundred dollars, less the sixteen hundred dollars paid, making twenty-five thousand dollars in all.

On the twenty-fifth day of January, 1890, the day after the

rendition of said verdict (R. 33) the defendant in error filed its motion for a new trial, alleging as reasons therefor:

1st. That the verdict was not supported by the evidence.

2nd. That it was contrary to the weight of evidence.

That the Court erred in admitting improper evidence for the plaintiff and rejecting proper evidence for the defendant; that the damages were excessive; that the Court erred in its charge to the jury (R. 33), and erred in stating the evidence to the jury.

On the seventeenth of February, 1890, the plaintiff remitted ten thousand dollars; the motion for a new trial was overruled and judgment for fifteen thousand dollars rendered against the plaintiff in error (R. 37). A supersedeas bond was filed by the plaintiff in error (R. 39), and the cause brought to this the Supreme Court of the United States.

The declaration in the trial court filed contains no averment of the citizenship of the plaintiff, and consequently we shall contend that the judgment should be reversed, because there is nothing in the declaration to show jurisdiction in the United States Circuit Court for the Northern District for Illinois.

Our authorities upon this point will appear in our brief.

HENRY A. GARDNER,
WILLIAM McFADON,
Attorneys for Plaintiff in Error.

ASSIGNMENT OF ERRORS.

And now comes the plaintiff in error by Henry A. Gardner and William McFadon, its attorneys, and says that in the record of proceedings aforesaid, there is manifest error in this, to-wit:

I.

The judgment of the Circuit Court of the United States should be reversed, because there is no averment in the declaration of the defendant in error, filed in said court, showing that the controversy was between citizens of different states.

II.

The Circuit Court of the United States for the northern district of Illinois erred in not instructing the jury to find in favor of defendant in the court below as prayed for by it.

III.

Said court erred in instructing the jury as follows:

"The nurse in charge of the plaintiff, who appeared as a witness for the defendant, testified that when the plaintiff signed the release she was agitated and hysterical, but in possession of her mental faculties, as witness believed."

And in refusing to correct said statement of said nurse's evidence when informed by defendant in error that the nurse had not testified plaintiff was hysterical when signing the release.

IV.

The said court erred in instructing the jury as follows:

"If, however, plaintiff has satisfied you by the preponderance of the evidence that she was induced to enter into the settlement when her mind was so far weakened as not to comprehend the nature and force of what she was doing, or that while she was nervous, hysterical and afflicted with severe pain and indifferent to what she did she was induced by defendant's counsel, they knowing her condition and intending to take advantage of her, to enter into the settlement and sign the release without being fully informed of its contents, she is not concluded by it."

V.

The said court erred in instructing the jury in the language of the last foregoing assignment of error.

Because there was no evidence whatever tending to sustain the theory that defendant's counsel knowing the condition of the plaintiff and intending to take advantage and inducing her to enter into the settlement and to sign the release without her being fully informed of the contents, and because said charge is not a correct statement of the law applicable to the case at bar.

VI.

The said court also erred in instructing the jury as follows:

"If the plaintiff signed the release when she was agitated and afflicted with pain, hysterical, nervous and indifferent as to the results, and that knowing her condition the defendant, by its counsel, overreached her, importuned her, and induced her to enter into the settlement without enabling her to understand fully what she was doing, then the release would be voidable."

VII.

The said court also erred in instructing the jury as follows:

"If the plaintiff signed the release when she was agitated and afflicted with pain, hysterical, nervous and indifferent as to the results, and that knowing her condition the defendant, by its counsel, overreached her, importuned her, and induced her to enter into the settlement without enabling her to understand fully what she was doing, then the release would be voidable."

Because there was nothing in the evidence tending to show that the defendant's counsel, knowing her condition to be hysterical, nervous, agitated and indifferent, importuned plaintiff and induced her to sign the release without enabling her to understand what she was doing.

VIII.

The said court also instructed the jury as follows:

"Shortly after the settlement the money paid, less one hundred dollars ($100.00), was deposited in the First National bank in plaintiff's name and to her credit. The one hundred dollars ($100.00) was paid for board, medical services, and other necessary expenses, and the amount deposited in the bank all went in the same way on checks signed by plaintiff. If, fully comprehending the terms of the settlement and when and how she obtained the sixteen hundred dollars ($1,600.00), she subsequently expended all or any part of the money, that amounted to an affirmance of the settlement, and if the settlement was once affirmed it could not be subsequently disaffirmed. If, however, you believe from the evidence that the money was expended by plaintiff or by others for her use and benefit while she was yet mentally incapable of comprehending the nature of the settlement, then its disbursement did not constitute a ratification of the settlement."

~~IX.~~

~~The said court also instructed the jury as follows:~~

~~"Shortly after the settlement the money paid, less one hundred dollars ($100.00), was deposited in the First National bank in plaintiff's name and to her credit. The one hundred dollars ($100.00), was paid for board, medical services, and other necessary expenses, and the amount deposited in the bank all went in the same way on checks signed by plaintiff. If, fully comprehending the terms of the settlement and when and how she~~

obtained the sixteen hundred dollars ($1,600.00), she subsequently expended all or any part of the money, that amounted to an affirmance of the settlement, and if the settlement was once affirmed it could not be subsequently disaffirmed. If, however, you believe from the evidence that the money was expended by plaintiff or by others for her use and benefit while she was yet mentally incapable of comprehending the nature of the settlement, then its disbursement did not constitute a ratification of the settlement."

IX.

Said court erred in the last sentence of said instruction which submitted to the jury the question whether the plaintiff was not mentally capable of comprehending the settlement while spending the money, because there was no evidence to show that she was not mentally capable of comprehending the settlement while spending the money.

And the said the Chicago, St. Paul & Kansas City Railway Company, plaintiff in error, prays that the judgment aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by occasion of said judgment.

HENRY A GARDNER,
WILLIAM McFADON,
Attorneys for plaintiff in error.

BRIEF.

I.

It must appear either by the pleading in an action or in some paper properly constituting the record on which the judgment is rendered, that the controversy is between citizens of different states, otherwise the judgment of the lower court will be reversed in the Supreme Court of the United States.

Continental Ins. Co. vs. Rhoads, 119 U. S., 237.
Denny vs. Pirone and cases cited, 141 U. S., 121.
Everhart vs. Huntsville College, 120 U. S., 223.
Mansfield, &c. R'y Co. vs. Swan, 111 U. S., 379.
Halsted vs. Buster, 119 U. S., 341.

Because in this case, it does not so appear of what state the plaintiff below was a citizen when the suit was brought, the judgment rendered below must be now reversed.

For the omission of this jurisdictional averment the judgment of the trial court must be reversed.

Mansfield Railway Co. vs. Swan, 111 U. S., 379.

II.

The rule of law is clear that fraud is not to be presumed, but must be proven by him who charges it.

Cooley on Torts, p. 475.

Hague vs. Thompson, 1 Black, U. S., 80.

And that a sealed instrument is never to be avoided for fraud, unless the proof of fraud is full, clear and explicit.

Penna. R. R. Co. vs. Shea, 82 Pa. St., 203.

Stine vs. Sherk, 1 W. and S., 195.

Spitze vs. B. & O. R. R. Co., Md.

Rupart vs. Dunn, 1 Rich., 101.

And where there is no proof of fraud, or not sufficient proof to sustain a verdict, the court should not submit the question of fraud to the jury at all.

Improvt. R. R. Co. vs. Munson, 81 U. S., 482.

U. S. vs. Brightly, 20 How., U. S., 254.

Schuchhardt vs. Allen, 1 Wallace, 369.

In this case, there was no evidence of fraud at all in the procurement of the release in question, and the charge of the trial court was erroneous in submitting to the jury any question as to the defendant's counsel overreaching the plaintiff in the procurement of said release, or any other question as to fraud in the getting of the same.

But from another standpoint of view, the charge of the trial court was erroneous on this question of fraud. It is a rule of the United States Court that as a defense at law, fraud can be only used to defeat an instrument under seal when the fraud is of such kind as goes to the execution of the instrument itself—fraud of a kind which shows that the party signing the same has been duped into signing an instrument under the false representation that it was of one kind of a paper, when in fact it was quite another.

George vs. Tate, 102 U. S, 564.

Hartshorn vs. Day, 60 U. S., 211.

The evidence to establish fraud to avoid a release, such as that in evidence, must show that the party signing the same was imposed upon by some artifice of the releasee, and in consequence thereof, that the releasor was led to sign such release, believing it to be a wholly different paper from what it in fact was.

Millin vs. Old Colony R. R., 127 Mass., 89.

The charge of the trial court was erroneous for not following these well recognized distinctions of law as to what constitutes fraud, and for permitting the jury to avoid the instrument if the releasor was not fully informed of its contents, or without defendant's counsel fully enabling plaintiff to understand what she was doing.

Hartshorn vs. Day, 19 How., 211.

George vs. Tate, 102 U. S., 564.

For any other kind of fraud or for any other ground of attack than one of the kind last mentioned, the release in question would only be avoided by a bill in chancery, in other words, by a direct proceeding having that end in view.

Irving vs. Humphrey, 1 Hopk., N. Y., 284.

George vs Tate, 102 U. S., 564.

III.

On the question of ratification the trial court should have given weight in its instruction to the time intervening between the moment when plaintiff herself testifies she knew of the settlement and the time when she attempted to rescind, the period being but a trifle short of two full years.

McLean vs. Clapp, 141, U. S., 432.

Grimes vs. Sanders, 93, U. S., 55–67.

By HENRY A. GARDNER,
WILLIAM McFADON,
Attorneys for plaintiff in error.

ARGUMENT.

A.

The writer of this argument, who was in no way connected with the trial of the case in the court below, has searched the record for an allegation showing that the controversy is between citizens of different states, but has failed to find such averment.

It is averred that the defendant, the now plaintiff in error, was a corporation created by the laws of Iowa (R. 4). This averment as to the plaintiff in error is an averment that the plaintiff in error, the defendant below, was a citizen of the State of Iowa, but we find nothing in the record below which shows anything as to the citizenship of Nellie Pierce, the defendant in error.

In the case of Everhart vs. Huntsville College, 120 U. S., 223, it was held that, "when the jurisdiction of a circuit court depends upon the citizenship of the parties, and that court takes jurisdiction and renders judgment, and the record in this court in error or on appeal fails to show the requisite citizenship, the judgment will be reversed and the case remanded by this court on its own motion, and the party in default adjudged to pay costs here."

In the case of Halsted vs. Buster, et al., 119 U. S., 341, the facts of the case being quite like those in the case at bar, the only difference being that the citizenship of the plaintiff was averred but not that of the defendants, the Court says, "the record does not show that the Circuit Court had "jurisdiction of the suit which depends alone on the citizen-"ship of the party * * * for this reason the judgment is "reversed, but as the fault rests alone on the plaintiff whose "duty was in bringing the suit, reversal will be at his cost."

Other decisions of the same kind are:

M. C. & L. M. R'y Co. vs. Swan, 111 U. S., 379.

Denny vs. Pironi, 141 U. S., 121.

In case of a defective averment in this particular the judgment of the trial court will be reversed by this court upon its own motion.

Peper vs. Fordyce, 119 U. S., 469.

Everhart vs. Huntsville College, 120 U. S., 223.

Menard vs. Goggan, 121 U. S., 253.

Because of the omission of the averment in the declaration of the plaintiff below, showing that the controversy is between citizens of different states, the judgment of the trial court must be reversed.

This class of decisions of this court are of all the more importance since the act of Congress of March 3rd, 1887, as corrected by the act of August 30th, 1888, have gone into court. Since the act last mentioned the declaration should not only show that the controversy was between citizens of different states, but it should also show that the suit is brought in the residence of either the plaintiff or defendant.

In the case at bar the declaration did not even show that the plaintiff was a resident of the district in which the suit was brought.

The authorities just cited are sufficient to show that this cause must be reversed for the reasons just given.

B.

1.

The court erred in submitting to the jury any question as to the defendant in error being overreached by the counsel for plaintiff in error, in the matter of the execution of the release in evidence before the jury.

The court in substance charged the jury as follows:

If the plaintiff signed the release when she was agitated and afflicted with pain, hysterical, nervous and indifferent to the results, and the defendant, by its counsel, knew her condition, overreached her, importuned her and induced her to enter into the settlement without enabling her to understand fully what she was doing, then the release would be voidable. (R. p. 71.)

The court also charged the jury in substance as follows:

If, however, the plaintiff has satisfied you by the preponderance of the evidence, that she was induced to enter into the settlement, that her mind was so far weakened as not to comprehend the nature and force of what she was doing, or that while she was nervous, hysterical and afflicted with severe pain and indifferent to what she did, she was induced by the defendant's counsel, they knowing her condition and intending to take advantage of her, to enter into the settlement and sign the re-

lease without being fully informed of its contents, she is not concluded by it.

The record will be searched for in vain for any evidence showing that the defendant's counsel in any way or manner sought to take advantage of the defendant in error, or sought in any way or manner to overreach her.

At the time the release in question was executed, the evidence shows five persons were present, namely, John Hannah, the brother of the defendant in error; the defendant in error herself and her nurse, Mrs. J. B. Young, and John Thompson and Henry A. Gardner, solicitors for the plaintiff in error.

The plaintiff's testimony is found in the Record, pp. 46 and 47, 53, 54, 55 and 56; she testifies (R., p. 53) that she remembers about a paper being placed before her and thinks they (not saying who) asked me to do something. She thought she was dying and did not care for anything, only to get them (not saying who) away from me; she says (R., p. 56) that she had a conversation with Mr. Thompson, a week before the day the release was signed, about an examination of physicians. She remembered (R. p. 53) being put up in bed and something being placed in her lap at the time the release was executed.

John Hannah (R. p. 59) says, that Mr. Thompson and Mr. Gardner talked with his sister, not longer than five or ten minutes, before a settlement was concluded, and that at the end of the talk they raised her up, put a paper before her and a pen in her hand, and she scribbled her name on it. They put the money on the bed, took the paper and walked off with it; he says the paper was not read to her.

John Hannah had some conversation with the witness Thompson, before the release was executed and at an entirely different place than at that where the release was signed, in which he says that Mr. Thompson urged him to persuade his sister to let him, Thompson, see her, saying that Mr. Thompson stated to him that he thought that if he, the brother, could persuade his sister to let him, Thompson, see her for a few minutes, they could make a satisfactory settlement without bringing any attorney into the matter, and that he finally consented to arrange for the interview (R.60), but as all this, however, occurred before the release was signed and at another place, it can shed no light on the interview on the result of signing the

release aforesaid, at which the five persons mentioned were present.

Mrs. Young (R. p. 65) the nurse of the defendant in error, testifies that the matter was talked over with Mrs. Pierce and the settlement of $1,600 was agreed upon as a result of such talk. She not only does not state anything tending to show that there was any effort to overreach Mrs. Young, but testifies that the release was executed by Mrs. Pierce freely. The witness Thompson testifies that the release was read to defendant in error (R. p. 62) and the witness Gardner testifies to the same thing. (R. 63). Both testify that the release was freely signed.

On this evidence we say that the Court erred in submitting to the jury the question as to whether the defendant's counsel intended to take advantage of the plaintiff, or whether knowing her condition, the defendant by its counsel, overreached her and induced her to enter into the settlement without understanding what she was doing. There was not a particle of evidence that anything of the kind was done or that anything of the kind was attempted or anything of the kind was intended.

The law, as applicable to fraud in such cases, is stated in "Cooley on Torts," p. 475, thus, "fraud is never presumed, and the party alleging and relying upon it must prove it."

In Hague vs. Thompson, 1 Black, U. S., 80, the rule is stated to be fraud, as follows: "Fraud cannot be presumed or inferred without proof in a court of equity, any more than in a court of law, and in both the rule is that he who makes the charge must prove it." These quotations are but statements of the universal law, applicable to the subject.

The only facts proven by the plaintiff below, in the case, were that at a certain interview at which five persons were present, namely, the plaintiff and two friends of hers and two attorneys for the defendant, the release in evidence was signed. There is no proof of any false representation by the defendant's counsel; there is no proof that the release was misread to the plaintiff; there is no proof that she was urged or induced by defendant's counsel to sign the release in question.

From the facts proven no inference of fraud can be drawn and there is certainly no evidence of any fraud or attempt to overreach the plaintiff shown in the case.

The rule of law is clear, that where there is no evidence of fraud it is error for the trial court to submit such question to the jury.

Impvt. R. R. Co. vs. Munson, 81 U. S., 442.

U. S. vs. Breitling, 20 How., 254.

Schurthard vs. Allen, 1 Wallace, 369.

On these authorities and for these reasons we say that the charge of the Court was erroneous in submitting the question above stated to the jury at all.

In confirmation of our view we cite from a case where a release was sought to be set aside on the ground of fraud, namely, Pennsylvania R. R. Co. vs. Shay, 82 Pa. State, 203, where the courts say, "It has been more than once held that it "is error to submit a question of fraud to the jury upon slight "parol evidence to overturn a written instrument. The evidence "of fraud must be clear, precise and indubitable, otherwise it "should be withdrawn from the jury (citing Stine vs. Sherk, 1 "W. & S., 195; Irwin vs. Shoemaker, 8 W. & S., 75, and "Dean vs. Fuller, 4 Wright, 474). Since parties are allowed to "testify on their own behalf it has become still more necessary "that this important rule should be strictly adhered to and en- "forced."

In Spitze vs. B. & O. R. R. Co., Maryland, 23 At. Rep., 307 the Supreme Court of Maryland passes upon a release where an attempt was made to set aside the same on the ground of fraud.

The Court in the last case comment on the fact that there was no evidence to show that the agents of the railroad company had made any statement or held out any inducement which influenced the party executing the release to sign it without inquiring as to its contents. That nothing had been concealed by them as agents of the company they were bound to communicate, and that there was no evidence that the said agents practiced any concealment or deception upon said party; that there was nothing to indicate bad faith on the part of said agents, and nothing to show that they knew or suspected that the party signing the release did not know the effect of the papers he signed.

The court proceeding further says that the releasor gave no intimation to the agents of the company, that he was ignorant of what he was doing, and that the attending circumstances

imposed no duties upon the agents with reference to him, and they were justified in thinking he thoroughly understood what he was doing.

In the case last mentioned the court says, the testimony proves not fraud on the part of the defendant but carelessness on the part of the plaintiff, and it would lead to startling results if a person who executes without coercion or undue influence a release under seal, can subsequently impeach it on the ground of his own carelessness, although at the time of its execution he might, if he had seen fit, have inquired as to the nature and legal effect of the act he was doing, and the court concluded that the charge of fraud was not upheld.

The foregoing is the substance of the decision in the Marvland case last cited. The suggestion of the court in that case, that the party executing the release might have advised himself fully as to the nature and effect of the act he was doing, applies here to the case at bar.

The defendant in error had her brother and her nurse in the room and if she had not been satisfied with her own understanding of the release in question, she could have called them to her aid and had the release examined, read over to her, or whatever else done which was necessary to enable her to understand thoroughly the effect of her acts.

The charge of the judge to the jury upon the foregoing authorities was in the points complained of, clearly erroneous. This charge pre-supposes that the defendant below and its agents were under a duty of protecting defendant in error. The facts in the case imposed no such duty on plaintiff in error or its agents.

In the case of Doty vs. Chicago, St. Paul & Kansas City Railway Company, 52 N. W. Rep., 136, the defendant set up a release and settlement of the claim for damages, and evidence was introduced to the effect that after suffering the injuries complained of, the plaintiff had called at the defendant's office and submitted to an examination by defendant's surgeon, who stated, as his professional opinion, that the plaintiff's injuries were slight and easily cured, and that thereupon the plaintiff and defendant agreed upon a settlement, and plaintiff, for a valuable consideration, executed a written release of her claims.

The Supreme Court of Minnesota, in this case say:

"There was not a particle of evidence in the case from which

"the jury might determine that any agent of the defendant had "made any fraudulent representations to plaintiff to induce her to "execute the release pleaded in her defense. What was said to "her by Dr. Millard was merely the expression of his opinion as "to the cure of her injury, and there is nothing to suggest that "the opinion was not given with the utmost good faith."

This decision was closely applicable to the case at bar with this difference, that the case at bar is much stronger; there is no showing here that there was any representation made to the plaintiff in connection with the release. As we have seen, the settlement was voluntary; the plaintiff had her own brother and friends surrounding her; there was no evidence of any misrepresentation, and the trial court greatly erred in putting the burden upon the defendant of protecting the plaintiff in the manner of the execution of the release in question.

2.

But we go one step further in our complaint of the charge at the trial court upon the question of fraud. The case, it is to be remembered, is on the law side of the court; we are dealing with a release under seal and in the United States courts the rule of law is that fraud to avoid an instrument on the law side of the court, must be such as to show that the instrument never had any legal existence, or as stated in Hartshorn vs. Day, 60 U. S., 211, fraud in the execution of the instrument has always been "whether it has been misread or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence."

In George vs. Tate, 102 U. S., 564, the courts say "it "is well settled that the only fraud permissible to be proved "at law in these cases is fraud touching the execution of the "instrument, such as misreading, surreptitious substitution of "one paper for another, or obtaining by some other trick or "device an instrument which the party did not intend to give." * * * Here follow citations. "The remedy otherwise is "by a direct proceeding to avoid the instrument. 1 Hopk. 284."

An examination of the charge of the trial court will show that the case was not submitted to the jury in the light of the well settled principles just announced. The charge of the trial

court did not tell the jury that the only fraud which they were to consider was fraud of the kind mentioned in the authorities just cited, namely, in a fraud going to the execution of the instrument itself. So far from regarding the principles just announced the trial court allowed the jury to avoid the instrument, provided the plaintiff signed a release without being fully informed of its contents; that is to say, that though the plaintiff meant to sign the release in question, yet the jury might avoid it, provided they believed plaintiff was not fully informed of its contents, through the efforts of the defendants to take advantage of her. The charge of the Court, as given, allowed the jury in a trial at law to avoid a release for considerations which should be urged in a court of equity alone.

Had there been evidence of fraud on which the case should have gone to the jury, (a fact as heretofore we deny), nevertheless, the Court should have referred the question to the jury of fraud touching and in the matter of execution of the instrument, as announced in the last foregoing authorities; in disregarding the decisions last cited, the charge of the Court was erroneous.

C.

The charge of the trial court on the subject of ratification is faulty in disregarding the delay on the part of defendant in error as an element of ratification.

The testimony of the plaintiff showed (R. 54) that within a week or ten days after signing the release, she learned about it and was not as bad in health then as at the time she signed the release; that she talked about the matter with friends; that she was told that she got sixteen hundred dollars for signing the release a week or ten days after doing so; she knew that the money was paid to her and that it belonged to her by what she was told. (R. 55 and 56.)

The plaintiff signed this release on the 23d of September, 1887; in August, 1889, she made a tender back of the sixteen hundred dollars which defendant paid her for the release, with 6 per cent interest from September 23d, 1887. The plaintiff waited nearly two years before indicating to the railroad company a disaffirmance of the release or from September 23, 1887, to August, 1889. It was the duty of the plaintiff on her own showing to have acted promptly in the way of disaffirming the release at the moment she had the conversation with her friends above named, which was ten days after she signed the same.

In McLean vs. Clapp, 141 U. S. 432, this court says: The rule is thus stated by this court in the case of Grymes vs. Sanders, 93 U. S. 55, 62:

"Where a party desires to rescind upon the ground of mis-"take or fraud, he must, upon the discovery of the facts, at once "announce his purpose and adhere to it.

"If he be silent, and continues to treat the property as his "own, he will be held to have waived the objection, and will be "conclusively bound by the contract, as if the mistake or fraud "had not occurred. He is not permitted to play fast and loose. "Delay and vacillation are fatal to the right which had before "subsisted."

The trial court in charging upon the question of ratification should have taken into account as a factor the delay of the plaintiff above mentioned. In not doing so, the charge of the trial court as given was erroneous.

We confidently ask for a reversal in this case.

HENRY A. GARDNER,
WILLIAM McFADON,
Attorneys for Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
OCT 31 1893
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

TERM NO. 153.

THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

NELLIE E. PIERCE, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

SUPPLEMENTAL BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

HENRY A. GARDNER,
WILLIAM McFADON,
ATTORNEYS FOR PLAINTIFF IN ERROR.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

The object of this supplemental brief is to call the attention of the Court, a little more fully than is done in our brief already filed herein, to the assignment of error found on page 83 of the record (foot of page 41 printed record).

The trial Court told the jury that "if, however, you believe "from the evidence that the money was expended by the "plaintiff, or by others, for her use and benefit while she was "yet mentally incapable of comprehending the nature of the "settlement, then its disbursement did not constitute a rati-"fication of the settlement."

There was no evidence that defendant in error was not mentally capable of comprehending the settlement while spending the money received for the release which she signed.

In her testimony on the point, she says she first learned about the release being signed by her about a week or ten days after she signed the same. She remembered talking about the matter, and she remembered friends talking about it in her room (R. 54). At this time they told her she had gotten $1,600 for signing the release. She was asked:

"But when you found that you had received the $1,600, "what did you do with the money?"

She answered: "It was expended for my expenses, more "or less."

Q. "Did they tell you from whom you had received the "$1,600?" A. I believe they did.

Q. For signing the release wasn't it? A. I do not remember about any release what was said, that is, to enter into any details.

Q. But you knew that you had signed a release? A. "I knew what had been told to me."

Q. They told you that you had signed the release and that the company had paid you $1,600? A. What I was told sometime after, after it, yes, sir; I don't remember anything about it at all.

Q. After you took the $1,600, did you expend it? A. I did not expend it.

Q. But you knew it was being expended, didn't you? A. Most assuredly. I recollect knowing that from having my friends tell me of it, but they expended it for me—took it. I don't remember anything about it.

Q. Did you know what it was being expended for? A. For doctor's bills and nurses and medicine, and every conceivable thing that could be thought of *for the past two years or more. At least it was six or eight months before it was exhausted, more or less.*

The defendant in error then went on to say that this $1,600 was all the money she had, aside from the assistance of her brothers; that when she found the money was being expended for her she made no objection; that the money was in other people's hands to do as they pleased—what they thought best—with it. She stated that by what she was told, she knew the money belonged to her; that she did not remember anything about it (R. 54, 55).

The record contains no evidence in contradiction of the defendant's in error testimony upon the questions of her being told ten days after the release was signed; that she had received the $1,600 for a release; nor is there any contradiction in the record of her testimony as to her knowing that the money was being expended for herself during a period of six or eight months after the same was paid her. Upon the payment of this money, the brother of defendant in error, John Hanna, deposited either $1,500 or the whole of it in the First National Bank of Chicago, in the name of defendant in error. Before making the deposit the signature of defendant in error was required in the deposit book of the bank. The same brother went back to where she was, got her signature on a piece of paper, took it to the bank and pasted it in the deposit book. He told his sister (defendant in error) why he wanted her signature to the paper. He says, "I did not get it unless she gave some recognition that it was there." (R. 64.)

The deposit book was in evidence, and the signature of the defendant in error therein was admitted as hers. (R. 65.)

Such being the testimony of the defendant in error, such the evidence in the record on the question of her expending the money she had received for the release which she was seeking to repudiate, we ask, where is the evidence in contradiction of her own testimony, that she knew from being told ten days after the signing of the release, that she had received $1,600

for the execution of the same, and that this money was being expended for her own benefit. Does she say that she was mentally incapable of comprehending the nature of the settlement while the proceeds of it were being expended? Clearly not! Her testimony shows that she knew what had been done, why it had been done, and with this knowledge she used and expended the proceeds of the release in question.

It was error on the part of the trial court to submit to the jury the question of whether the defendant in error was not mentally capable of comprehending the settlement while she was spending the money.

HENRY A. GARDNER,
WILLIAM McFADON,
Attorneys for Plaintiff in Error.